Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LANDGATE, INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

BENJAMIN M. REZNIK
(Counsel of Record)
JOHN M. BOWMAN
JEFFER, MANGELS, BUTLER
& MARMARO, LLP
2121 Avenue of the Stars
Tenth Floor
Los Angeles, California 90067
(310) 203-8080
Counsel for Petitioner.

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QUESTIONS PRESENTED

1. Where real property cannot be put to any economically beneficial or productive use from the time a state administrative agency makes a final decision to deny a development permit until judicial invalidation of the agency's decision, does a property owner have a constitutional right to receive just compensation for a temporary taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or does judicial review of the agency's permit denial constitute a non-compensable "normal delay" in the development process within the meaning of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)?

2. Under *First English*, does the implied exception from temporary takings liability for "normal delays" in obtaining development permits extend to judicial proceedings that conclude with a holding that an administrative agency's decision to deny a permit was not authorized by state law, or does it cease to apply once the agency charged with implementing the regulations renders a final decision on the application?

3. Did the court below err in holding that the temporary denial of all use of land caused by an agency's erroneous decision to deny a development permit constitutes "normal delay" within the meaning of *First English* as long as the agency's decision, although unlawful, attempted to advance some legitimate governmental interest?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in this Court are Landgate, Inc. ("Landgate") and the California Coastal Commission (the "Commission").

Landgate is the owner of the subject real property and was the applicant in the underlying administrative proceedings. Landgate has neither a parent company nor any subsidiaries.

The Commission is a state agency organized and existing under the laws of the State of California. Under the California Coastal Act of 1976, California *Public Resources Code* §§ 30000 et seq., the Commission has jurisdiction to approve "development" within the coastal zone, as defined by law.

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28 U.S.C. §1257(a) 1

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OPINIONS BELOW

The opinion of the California Supreme Court is reported as *Landgate, Inc. v. California Coastal Commission*, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841 (1998); the entire opinion appears at Appendix A to the Petition. The opinion of the California Court of Appeal upholding the trial court's decision to grant Landgate's motion for summary adjudication of its takings claim was certified for partial publication pursuant to California Rules of Court, Rules 976(b) and 976.1, and was partially published in an unofficial reporter as *Landgate, Inc. v. California Coastal Commission*, 61 Cal.Rptr.2d 196 (1997); the entire opinion appears at Appendix B to the Petition. The earlier opinion of the California Court of Appeal upholding the trial court's decision to issue a writ of mandate is unreported; the entire opinion appears at Appendix C to the Petition. The relevant orders and opinions of the trial court are unreported; they appear at Appendices D and E of the Petition.

JURISDICTION

The Supreme Court of California entered its opinion and judgment on April 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

The Fifth Amendment is made applicable to the States through the Fourteenth Amendment. *See Chicago, Burlington & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). The Fourteenth Amendment provides in pertinent part: "nor shall

any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Background

Landgate owns a 2.5-acre vacant lot in the Malibu hills zoned for residential use. Although the lot is not visible from the coastline, it is located within the "coastal zone" as delineated by the Commission. App. 3a.

The subject lot was created by Landgate's predecessor-in-interest and approved by the County of Los Angeles in 1989 through a procedure known as a "lot line adjustment." The purpose of the lot line adjustment was to accommodate the County's plan to construct an east-west roadway bisecting two adjoining lots owned by Landgate's predecessor-in-interest. Under the approved lot line adjustment, the former lots, which ran in a north-south direction, were reconfigured into two new lots running in an east-west direction (one lot on each side of the new roadway). App. 3a.

Landgate purchased the newly-created northern lot in 1990. After posting a $52,000 street bond, Landgate applied for and received County approval of grading and building plans to construct a single-family home on the property. App. 3a.

In October 1990, Landgate filed an application with the Commission for a coastal development permit for the proposed residence.[1/] In February 1991, the Commission denied

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[1/] Because the Commission had not yet certified the County's "local coastal program," a coastal development permit was required from the (continued...)

Landgate's application on the ground that, among other things, the lot itself was not "legal" because the lot line adjustment previously approved by the County had not been approved by the Commission and therefore constituted impermissible "development" under the Coastal Act. Landgate's request for reconsideration, which proposed reductions in the height of the structure and the amount of grading, was denied by the Commission during its April 11, 1991 meeting.[2/] App. 8a.

Thus, the Commission, in an attempt to expand its jurisdictional reach, refused to issue a development permit to Landgate. The Commission's decision to deny the application constituted a final decision by the Commission regarding the extent of development it would allow on Landgate's lot -- none.

B. Proceedings Below

In March 1991, Landgate filed a lawsuit against the Commission, seeking a writ of mandate to set aside the Commission's final decision to deny the development permit. The complaint also sought damages for the temporary taking of Landgate's property without just compensation. App. 7a.

In October 1991, the trial court issued a writ of mandate overturning the Commission's denial of Landgate's application

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[1/](...continued)
Commission for the proposed construction.

[2/] During the meeting, the Commission's Chief Counsel advised the Commission that "without the lot line adjustment some of these revisions are I think irrelevant." Additionally, the Commission's Executive Director told the members that "without your willingness to change the lot line, [the proposed changes] wouldn't have led to a different result ...." App. 63a.

and ordering the Commission to reconsider the application without regard to the lot line adjustment (i.e., to consider Landgate's property to be a legal lot). The trial court determined that the term "development" as defined by state law "does not include the lot line adjustment approved and recorded by the County ...." App. 104a.

In December 1992, the California Court of Appeal affirmed the trial court's decision to issue the writ. App. 99a. The court noted that the Commission retained "its ability to regulate and approve any proposed *building* on the lot." App. 98a (emphasis added).

On February 16, 1993 -- nearly two years after the Commission rendered its final decision to deny Landgate's application -- the Commission, in response to the trial court's writ of mandate, conditionally approved a coastal development permit to construct a residence on Landgate's lot. App. 64a. Landgate, having expended its construction funds on litigation, was unable to construct the proposed residence.

Landgate then sought summary adjudication on its remaining temporary takings claim, arguing that the Commission's illegal denial of a development permit prevented it from making any economically viable use of its property. The Commission also moved for summary judgment, contending that its "jurisdictional error" did not constitute a taking of Landgate's property. The trial court granted Landgate's motion for summary judgment and denied the Commission's motion, ruling that the Commission had temporarily taken Landgate's property from February 1991 to February 1993. In its statement of decision, the trial court ruled that Landgate's regulatory takings claim was meritorious as a matter of law "because Landgate has been deprived, at least temporarily, of all economically viable or productive use of its property insofar as

Landgate, at least temporarily, could not legally obtain any valid permits or approvals to construct any project on its property as a result of the Commission's actions." [2] App. 101a.

The trial court's ruling that the Commission was liable for the temporary taking of Landgate's property was affirmed by the California Court of Appeal in a partially published opinion. App. 90a. In so ruling, the appellate court relied on *Lucas, supra*, which held that a restriction that denies all use of property constitutes a regulatory taking of property without regard to the public interest advanced in support of the restriction. Observing that "the Commission does not argue that a viable use of the land remained after the permit denial," the court simply applied *Lucas* and concluded that the Commission's decision worked a categorical taking of Landgate's property for a two-year period. App. 69a. In response to the Commission's argument that it should not be held liable for its "mistake," the court added:

> Nothing in the record suggests that the lot line adjustment issue arose out of anything other than the Commission's ongoing jurisdictional spat with the County of Los Angeles combined with a desire to prevent Landgate from building on its parcel. Instead, the overwhelming sense of the record is that by its insistence that the lot itself was illegal, the Commission put Landgate in a situation which was not of Landgate's own making and which Landgate could do nothing to cure. In short, this was not a case of bureaucratic bungling, but a declaration of war between governmental behemoths in which the inevitable

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[2] After a bench trial on the issue of damages, the trial court subsequently ordered the Commission to pay temporary takings damages of $155,657 to Landgate. App. 10a.

casualty was to be a noncombatant, Landgate.[4] App. 71a-72a.

The California Supreme Court granted the Commission's petition for review of the case "to address the important question of whether the Commission's mistaken assertion of jurisdiction of the lot line adjustment in this case led to a temporary taking of Landgate's property."[5] App. 11a. Focusing on the above-quoted language from the Court of Appeal's decision, the court below, in a 4-3 decision, disagreed with the characterization of the Commission's action as the product of a "jurisdictional spat" between two agencies, and concluded that the Commission's denial of Landgate's permit application, while erroneous, advanced legitimate governmental interests.[6] For this reason, the court concluded that the two-

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[4] Landgate was apparently not the first "casualty" in the "war" between the Commission and the County. In *Healing v. California Coastal Commission*, 22 Cal.App.4th 1158, 1167-68 (1994), the Commission took the position that Healing's regulatory takings claim was not "ripe" because the Commission could not say one way or the other whether Healing's house "could affect" the County's ability to obtain certification of its local coastal program -- something the County had been trying to do since 1982. In rejecting this argument, the court observed that "[t]o state the Coastal Commission's position is to demonstrate its absurdity." *Id.* at 1168.

[5] In its petition for review, the Commission did not seek review of the trial court's or the Court of Appeal's determination that the permit denial deprived Landgate of all use of its property. Consequently, under California Rules of Court, Rule 28(e)(2), this ruling was not before the California Supreme Court.

[6] A careful reading of the Court of Appeal's decision reveals that its holding was based upon the undisputed fact that the Commission's final decision on the permit application deprived Landgate of all use of its

(continued...)

year delay suffered by Landgate in the development process constitutes "normal delay" in the development process and therefore was not a temporary taking of property under the Fifth Amendment. App. 32a. The court went on to conclude that the Commission's action was "at most conditional" and held:

> Nothing in *First English* ... is inconsistent with the recognition that a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, and the fact that a developer must resort to such a determination does not constitute a per se temporary taking. App. 32a-33a. (emphasis in original).

Accordingly, a sharply-divided California Supreme Court reversed and remanded with directions to grant the Commission's motion for summary judgment and to deny Landgate's motion for summary adjudication.

In a dissenting opinion joined by Justice Baxter, Justice Chin sharply criticized the majority opinion below on a number of grounds. Most notably, Justice Chin pointed out that Justice Stevens, in his dissent in *First English,* "articulated the precise argument on which the majority relies here ... that litigation over the validity of a land-use restriction is simply a 'normal delay' in the permit approval process and, therefore, cannot give rise to a temporary taking." App. 38a. Justice Chin observed that while the majority opinion in *First English* "considered Justice

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[2]/(...continued)
property for a two-year period, rather than the Commission's motives or "bad faith." Thus, by extensively discussing this secondary aspect of the case, the California Supreme Court was jousting with a straw man.

Stevens' argument *and rejected it*," it has "found new life in the majority opinion here." App. 38a (emphasis in original). Justice Chin concluded that when a regulatory agency prohibits all use of a particular property, forcing the property owner to sue the agency to get it to change its position, "its stonewalling is not fairly characterized as a 'normal delay' in the permit approval process." App. 37a.

Justice Brown wrote a second dissenting opinion, also joined by Justice Baxter, which even more vehemently criticized the majority. Justice Brown argued that the essential meaning of both *First English* and *Lucas* is that a final decision by a regulatory agency that denies all economically beneficial use of the property, even temporarily, is a per se compensable Fifth Amendment taking. Justice Brown emphasized that *Lucas* establishes a categorical rule making all regulation that denies all economically beneficial or productive use of land compensable without case-specific inquiry into the public interest advanced in support of the restraint. Consequently, Justice Brown concluded that if "a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, ... then, in California, at least for now, *Lucas* is a dead letter." App. 53a.

REASONS FOR GRANTING THE PETITION

This Petition should be granted in order to address the important questions left unanswered in *First English* and to clarify the application of the "categorical takings" rule of *Lucas* in the context of a temporary regulatory taking. In particular, state and lower courts need guidance as to whether this Court's apparent exclusion of "normal delay" in obtaining development permits from takings liability extends to litigation brought by a landowner to set aside an agency's final and erroneous decision resulting in a denial of all use. Further, in light of the new test

announced by the court below, direction is urgently needed as to whether the "substantial advancement" test applies in a case where, as here, the government agency's legally erroneous decision to deny a development permit deprived the owner of all use of its property.[7]

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[7] These questions have divided the lower courts. Examples of cases in which the courts have treated litigation as "normal delay" or have required takings claimants to establish that permit denial did not substantially advance legitimate interests notwithstanding the denial of all use include *1902 Atlantic Ltd. v. United States*, 26 Cl. Ct. 575 (1992) (court held that the temporary harms suffered by plaintiff during the period its permit was denied were significant but cannot be charged to the government); *Lujan Home Builders v. Town of Orangetown*, 568 N.Y.S.2d 850 (1991) (court held that "as long as a land use decision-making process passes constitutional muster in the procedural sense and a full judicial mechanism exists to challenge the administrative determination, no cause of action exists for deprivation of use of the property for the period of time the property could not be used as requested by reason of administrative denial or relief"); *Smith v. Town of Wolfeboro*, 615 A.2d 1252 (N.H. 1992) (court held that decrease in value of property during the governmental decision-making process must be borne out by the property owner and does not give rise to a compensable taking, stating that "[t]he delay inherent in the statutory process of obtaining subdivision approval, including appeals to the superior court and to this court, is one of the incidents of ownership"); and *Dumont v. Town of Wolfeboro*, 622 A.2d 1238 (N.H. 1993) (court held that "[a]lthough the board's mistaken decision impeded the plaintiff's conversion of his property," the loss was part of the governmental decision-making process and was therefore not compensable as a taking). Examples of cases in which the courts have rejected the "normal delay" defense and/or properly found that a categorical taking occurred without regard to the governmental interests advanced include *Healing v. California Coastal Commission*, 22 Cal.App.4th 1158, 1171 n.7 (1994) (court "summarily" rejected the Coastal Commission's contention that the delay suffered by plaintiff is

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This Petition should also be granted because the new *Landgate* test conflicts with this Court's decisions in *Lucas*, *First English*, and *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). First, the rule established below emasculates *Lucas*, rendering it inapplicable in all but the rarest of cases. As Justice Brown observed in her dissenting opinion below, the majority decision improperly attempts to supplant *Lucas'* categorical rule with the "squishy, 'multi-factor' test" of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), "a standard so amorphous it is capable of producing virtually any result." App. 44a. Second, the *Landgate* decision ignores *First English*'s admonition that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which a taking was effective." 482 U.S. at 321. In effect, the *Landgate* decision restores the pre-*First English* rule in California that "compensation is not required until the challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect." *Id.* at 309. Third, the California Supreme Court's holding that Landgate did not have a viable takings claim (notwithstanding

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2/(...continued)
"normal" and held that the Commission "may be liable for a regulatory taking even if it ultimately issues a permit" to plaintiff); *City of St. Petersburg v. Bowen*, 675 So.2d 626 (Fla. App. 1996) (court held that the invalidation of an ordinance "that effectively deprives the owner of all economically viable use of that property" signifies that a taking has occurred); and *Steel v. Cape Corporation*, 677 A.2d 634 (Md. Ct. Spec. App. 1996) (court held that "when an owner has been called upon to sacrifice all economically beneficial uses in the name of the common good," this constitutes a compensable taking).

the total denial of all use of its property) because the litigation it was forced to pursue against the Commission concerned "pre-conditions" of development is plainly inconsistent with the principles discussed in *Williamson County* regarding the "finality" of administrative decisions.

The questions presented are important because the answers provided by the court below represent a fundamental shift in the balance between the "freedom and flexibility of land-use planners and governing bodies" (*First English, supra*, 482 U.S. at 321), on the one hand, and the constitutional rights of property owners, on the other. Specifically, if a deprivation of all use of property resulting from a government agency's erroneous decision (and the associated litigation to set aside the decision) is not a regulatory taking because it falls within the implied exception for "normal delays" in obtaining development permits, the "exception" will swallow the "categorical rule" that "total regulatory takings must be compensated." *Lucas, supra*, 505 U.S. at 1004.

The importance of the questions presented in this Petition is underscored by the attention that this case has attracted from a wide spectrum of organizations and public agencies throughout California and the nation.[8/] Not surprisingly, this

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[8/] Organizations and agencies filing amicus briefs with the California Supreme Court include the California Chamber of Commerce; the California Building Industry Association; the California Cattlemen's Association; the California Forestry Association; the California Mining Association; the Building Industry Legal Defense Foundation; Home Builders Association of Northern California; Pacific Legal Foundation; the Coastal Protection, Planning and Conservation League; National Audubon Society; Natural Resources Defense Council; National Wildlife Federation; Sierra Club; and the City and County of San Francisco (joined by over 70 other California cities and counties).

case has been closely watched by governmental agencies throughout California, which apparently view the California Supreme Court's decision as providing a safe harbor from the Fifth Amendment's Takings Clause.

The impacts of *Landgate* on other pending regulatory takings cases in California are already being seen. *See California Coastal Commission v. Buckley*, 98 Daily Journal D.A.R. 7537 (July 10, 1998) (case transferred by the California Supreme Court to the California Court of Appeal with directions to vacate its decision and to reconsider the cause in light of *Landgate*). This Petition should be granted in order to send a message that reports about the untimely deaths of *First English* and *Lucas* in California have been greatly exaggerated.

A. The Petition Should Be Granted Because it Presents Important Questions Left Unanswered by this Court in *First English*

In *First English*, this Court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." 482 U.S. at 321. In so ruling, this Court expressly left unanswered "the quite different questions that would arise in the case of *normal delays* in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *Id.* (emphasis added).

In his dissenting opinion in *First English*, Justice Stevens rhetorically asked "[w]hether delays associated with a judicial proceeding that terminates with a holding that a regulation was not authorized by state law would be a 'normal delay' or a temporary taking ...." *Id.* at 334, n.10. The majority opinion

did not answer this question, and did not attempt to define the phrase "normal delays."

In *Landgate*, the California Supreme Court adopted the reasoning of Justice Stevens' dissent and held that judicial proceedings culminating with a holding that the Commission's action was not authorized by state law amounted to a "normal delay" within the meaning of *First English* and, therefore, do not constitute a regulatory taking. App. 32a-33a. Thus, the questions left unanswered by the majority in *First English*, and the very question posed by Justice Stevens in his dissent, are now squarely presented for review.

While the majority opinion in *First English* implied that "normal delays" in the development process would not constitute a temporary taking, this Court has yet to provide guidance as to the meaning of this term. Consequently, in an effort to circumvent the "just compensation" requirement for temporary takings, government agencies are increasingly invoking the "normal delay" defense when their actions are challenged as an excessive interference with private property. Indeed, the *Landgate* decision points the way -- raising serious questions regarding the continued efficacy of the principles announced by this Court in *First English* and *Lucas*.

B. The Questions Presented Are Important

It is established doctrine that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). It is equally well established that mere invalidation of the regulation, "though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." *First English*, *supra*, 482 U.S. at 319. Instead, under the "self-executing"

provisions of the Fifth Amendment, a government agency is compelled to pay compensation for such "temporary takings." *Id.* at 305.

The questions presented in this Petition are important because the test articulated by the court below for determining whether a "temporary taking" has occurred severely undermines the rule in *First English*, leaving property owners without a Constitutionally adequate remedy for excessive governmental inference with private property rights. The new test also vitiates the "categorical takings" rule of *Lucas*, requiring courts to consider whether an agency's action, albeit erroneous and confiscatory in effect, advances some legitimate governmental interest.

1. The Test Created by the Court Below Effectively Restores the "No Compensation" Rule Rejected by this Court in *First English*

Nearly 20 years ago, the California Supreme Court held in *Agins v. Tiburon*, 24 Cal.3d 266, 273 (1979), that a property owner is not entitled to compensation for the "regulatory" taking of his land unless and until the challenged regulation or decision has been held unconstitutional in an action for declaratory relief or a mandamus proceeding and the government agency has nevertheless decided to continue the regulation in effect. Under this rule, owners whose property was subjected to excessive regulations were generally limited to the remedy of invalidation of the offending regulation or decision. Although the California Supreme Court's decision was upheld on other grounds, this Court declined at that time to reach the question of whether a state may constitutionally limit the remedy for a taking to non-monetary relief. *Agins v. Tiburon*, 447 U.S. 255, 263 (1980).

Seven years later, this Court addressed the question left unanswered in *Agins*, i.e., whether government must pay compensation to a landowner whose property has been taken temporarily by the application of government regulations. In *First English*, a landowner sought compensation for the regulatory taking of its property based upon an allegation that a Los Angeles County interim flood protection ordinance deprived the owner of all use of its property. The California Court of Appeal upheld the trial court's dismissal of this claim, ruling that an owner whose property has been taken by a land-use regulation may not recover damages for the time period prior to the ultimate invalidation of the challenged regulation (i.e. during litigation). This Court disagreed, and concluded "that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period." 482 U.S. at 307.

In *First English*, this Court also implied (but did not rule) that "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" would not be compensable. Furthermore, this Court did not address (but impliedly rejected) the point raised by Justice Stevens in his dissent that "[l]itigation challenging the validity of a land-use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan." *Id.* at 334-35. In other words, while clearly rejecting the *Agins'* "no compensation" rule for temporary regulatory takings, the door was left slightly ajar with respect to the "normal" time period for obtaining development permits.

Taking advantage of the ambiguities in the *First English* decision, the court below has established a new rule that, if left to stand, will all but eliminate the possibility of obtaining compensation for temporary regulatory takings in California. In

Landgate, the California Supreme Court held, by a bare majority (4-3), that litigation to set aside an erroneous (but not "objectively unreasonable") decision by a governmental agency concerning "pre-conditions" of development constitutes "normal delay" in the development process and is therefore not compensable, even where the erroneous decision denies all use of the property. App. 25a-33a. Specifically, notwithstanding the fact that the Commission's wrongful denial of the proposed residence on Landgate's property resulted in the total denial of all use of the property for a two-year period, the court below, taking refuge in the "normal delay" language of *First English*, left Landgate with the sole remedy of invalidation of the Commission's illegal decision. In effect, this ruling resurrects the *Agins* "no compensation" rule in California.

2. The Test Created By the Court Below Vitiates the "Categorical Takings" Rule of Lucas

In *Lucas, supra,* this Court held that governmental regulations that deny a property owner all economically viable use of his or her land constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint.[9] 505 U.S. at 1016. Here, there is no dispute that the Commission's decision was erroneous as a matter of law and that it deprived Landgate all use of its property for a two-year period while the validity of the decision

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[9] The Court described the reason for this rule as follows: "[T]he fact that regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 1018.

was being contested in court. Pursuant to the "categorical takings" rule of *Lucas*, a temporary regulatory taking has clearly occurred and compensation is required.

The court below sidesteps this seemingly inescapable conclusion by creating a new and potentially massive loophole which will enable government agencies to escape the duty of paying just compensation even when their erroneous decisions result in the temporary denial of all use of private property. Specifically, according to the *Landgate* majority, so long as an agency's decision to deny a development permit can be characterized as being based upon a "pre-condition" of development and was not motivated by a "bad faith" intent to deprive the owner of his property, the legality of the agency's decision or its impact on the owner's ability to use the property is completely irrelevant to the takings inquiry. In other words, under the new *Landgate* test devised by the court below, government agencies can render illegal decisions on development permit applications resulting in the deprivation of all use of the property with impunity.

3. The Test Created by the Court Below Invites Regulatory Abuse

The potential for regulatory abuse is manifest. Under the new *Landgate* test, a government agency can repeatedly deny development permit applications on illegal, improper, or pretextual grounds, without having to be concerned about paying compensation for the temporary taking. In fact, an agency could keep a property owner in perpetual motion by forcing the owner to repeatedly file legal challenges to successive decisions by the agency. If the first decision is struck down, all the agency need do is render a new, and perhaps equally erroneous decision. As the litigation treadmill spins, the

property remains vacant and unusable for any beneficial purpose.[10/]

As this Court observed in *Nollan v. California Coastal Commission*, 483 U.S. 825, 841 (1987), compliance with the Fifth Amendment's Property Clause "is more than an exercise in cleverness and imagination." The Petition should be granted to ensure that the California Supreme Court's imaginative reading of *First English* does not vitiate the categorical rule of *Lucas*.

[10/] In *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 655 n.22 (1981), Justice Brennan (writing a nominal dissent that had the substantive concurrence of five justices) made a similar observation in an analogous context:

> Invalidation [unaccompanied by payment of damages] hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice: 'IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN. [¶] If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110 (1973), appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again. [¶] See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck.' Longtin, Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation), in 38B NIMLO Municipal Law Review 192-93 (1975).

4. The Test Created by the Court Below Unfairly Forces Property Owners to Bear the Burden of Governmental "Mistakes" in the Permitting Process

"It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English*, 482 U.S. at 318-19 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Here, the California Supreme Court has turned this principle on its head by requiring Landgate alone to bear the burden of the Commission's so-called "mistake." Since the Commission maintains that it was acting at all times in the public interest, fairness and justice dictate that this burden should be borne by the public as a whole.[11/]

Finally, it should be noted that, at least in the Ninth Circuit, a property owner may no longer pursue a claim for compensation under the "substantive" aspects of the Fourteenth Amendment's due process clause for excessive governmental interference with property rights. *Armendariz v. Penman*, 75

[11/] In *Landgate*, the majority suggests that the takings question should not turn on whether or not the agency prevails in the litigation because the "resolution of these cases often turns on the construction and application of complex statutory schemes and results in significant delays in the development process." App. 33a. In other words, the court seems to suggest that mistakes by government agencies (and the resulting litigation to correct these mistakes) are inevitable due to the increasing complexity of land use regulations, and that the public should not be held responsible for the consequences of these mistakes. Of course, this argument overlooks the fact that it is the public, through its representatives, that has created these "complex regulatory schemes" in the first place, presumably for the benefit of the public as a whole.

F.3d 1311, 1325-1326 (9th Cir. 1996) ("The scope of substantive due process does not extend to areas addressed by other, more specific provisions of the Constitution"); *Macri v. King County*, 126 F.3d 1125, 1128 (9th Cir. 1997) (dismissing plaintiff's substantive due process claim in light of *Armendariz*). Thus, as Justice Brown pointed out in her dissenting opinion below, the Fifth Amendment stands as the "last lonely bulwark" against regulatory abuse in the land development process -- making the questions presented more important than ever.

C. The Decision of the Court Below Is Erroneous and Conflicts with this Court's Decisions in *First English*, *Williamson County*, and *Lucas*

The California courts have a history of misconstruing or ignoring the dictates of the Fifth Amendment. *See First English, supra*, 482 U.S. at 311 ("[T]he California courts have decided the compensation questions inconsistently with the requirements of the Fifth Amendment"); *Nollan v. California Coastal Commission, supra*, 483 U.S. at 839 ("[O]ur conclusion on this point is consistent with the approach taken by every other court that has considered this question, with the exception of the California state courts"); *Parks v. Watson*, 716 F.2d 646, 652-53 (9th Cir. 1983) (characterizing California as representing the "extreme" end of regulatory takings jurisprudence). *See also* Coyle, *Property Rights and the Constitution* (State University of New York 1993), p. 11 (California is "a near unanimous choice [among legal land use scholars] as the state least likely to protect landowner rights"). In fact, of the twenty land use and regulatory takings decisions

rendered by this Court over the last 20 years, over one-half involved cases from California. Clearly, the California courts march to a different beat. *Landgate* is the latest case in point.[12/]

1. The Conflict with *First English*

The decision below conflicts with *First English* because it is based on, and adopts the reasoning of, the dissenting opinion in that case. Justice Chin made this point succinctly in his dissenting opinion below:

> In his dissent in *First English*, Justice Stevens articulated the precise argument on which the majority relies here. Specifically, Justice Stevens asserted, as does the majority here, that litigation over the validity of a land-use restriction is simply a "normal delay" in the permit approval process and therefore cannot give rise

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[12/] On March 30, 1998, the Court granted review of a Ninth Circuit regulatory takings case from California, *Del Monte Dunes v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996). In *Del Monte Dunes*, the City of Monterey repeatedly refused to grant development permits to the owner of a 37.6-acre ocean front parcel, in spite of the fact that the owner had complied with all of the city's development conditions. Although these facts are somewhat similar to those in *Landgate*, each case presents entirely different legal questions for the Court's review. Specifically, *Del Monte Dunes* concerns the following: (1) whether liability under 42 U.S.C. 1983 is a question of law or fact; (2) whether a jury or court may "reweigh evidence concerning [the] reasonableness" of the government's decision not to approve a land use; and (3) whether the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994) can be applied to an inverse condemnation claim that is based upon a regulatory denial. *Landgate*, on the other hand, presents a question of first impression regarding a government agency's liability for temporary takings during the pendency of litigation to set aside its erroneous decision.

> to a temporary taking. Justice Stevens stated: "The Court's analysis ... appears to erect an artificial distinction between 'normal delays' and the delays involved in obtaining a court declaration that the regulation constitutes a taking. [¶] *In my opinion, ... [l]itigation challenging the validity of a land-use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan."* Thus, Justice Stevens would have held that litigation over the validity of a land-use regulation, like other "normal delays" in the permit approval process, cannot give rise to a temporary taking even if the regulation deprives the property owner of all use of its property. The majority of the high court considered Justice Steven's argument *and rejected it*. Now, the same argument has found new life in the majority opinion here. App. 38a (citations omitted).

The holding of the court below that *litigation* to set aside an erroneous agency decision constitutes "normal delay" in obtaining a development permit cannot be reconciled with *First English*. Read in proper context, it is clear that the "normal delay" language in *First English* was intended to exclude from the compensation requirement, at most, the delays associated with the *administrative proceedings* before the governmental agency. Specifically, the phrase "normal delay" was qualified by this Court as follows:

> We ... do not deal with the quite different questions that would arise in the case of normal delays *in obtaining building permits, changes in zoning ordinances, variances, and the like* which are not before us. 482 U.S. at 329 (emphasis added).

The reference to building permits, zone changes, and variances indicates that this Court was referring to the administrative or legislative process leading up to a final decision by the governmental agency to approve or deny a development permit -- not subsequent judicial proceedings made necessary by the agency's erroneous determinations. In fact, it appears that Justice Stevens assumed that this was the majority's intent when he stated that "[l]itigation challenging the validity of a land-use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan." *Id.* at 334-35.

In support of its holding, the court below relied on *Agins* for the proposition that litigation is simply part of the "governmental decisionmaking process," and that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership.'" App. 19a (quoting *Agins*, *supra*, 447 U.S. at 263, n.9). This reliance is misplaced. In *First English*, this Court rejected this notion, holding that *Agins* "merely stand[s] for the unexceptional proposition that the valuation of property which has been taken must be calculated as of the time of the taking, and that ... preliminary activity did not work a taking." 482 U.S. at 320.

Here, the Commission's decision cannot be fairly characterized as "preliminary activity." As Justice Chin pointed out in his dissenting opinion below, "the Commission flatly denied the permit, and its decision was final in every sense." App. 38a.

In summary, the court below misconstrued the reference to "normal delays" in *First English* and improperly extended it to include litigation. This conclusion is inconsistent with *First English* because it leaves Landgate without a sufficient remedy

for the two-year period of time in which it was deprived all use of its property. The Commission's decision worked a taking of Landgate's property for a two-year period, and no subsequent action by the Commission (whether in response to the court's writ of mandate or otherwise) can relieve the Commission of its duty to pay just compensation for this period.

2. The Conflict with *Williamson County*

In *Williamson County*, this Court held that a regulatory takings claim "is not ripe until the *government entity* charged with implementing the regulations has reached a final decision regarding application of the regulations to the property at issue." 473 U.S. at 186 (emphasis added). *See also Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1665 (1997) (a "final and authoritative decision from the *agency*" is "sufficient to satisfy the [final decision] prong of *Williamson County*") (emphasis added). In *Williamson County*, this Court explained that one of the reasons for this rule is that the factors relevant to the takings inquiry "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." 473 U.S. at 191. Thus, under *Williamson County*, the "final decision" prong of the ripeness test is satisfied once the government agency -- not the courts -- makes a final determination regarding how it will apply the challenged regulations. *See also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986) (observing that the question of whether a land use regulation went "too far" depends, "in significant part, upon an analysis of the effect [of] *the Commission's* application of the zoning ordinance and subdivision regulations") (quoting *Williamson County*, *supra*, 473 U.S. at 199-200) (emphasis added).

The court below ignored this principle when it held that the Commission's decision was "at most conditional," and that the litigation brought by Landgate to set aside the Commission's illegal action was simply part of the "normal delays" associated with obtaining development permits. In effect, the court held that there could be no taking until after the courts (as opposed to the Commission) had determined how to apply the regulations at issue. This holding confuses the "ripeness" requirements of *Williamson County* with the doctrine of exhaustion of remedies. As this Court explained in *Williamson County*:

> While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative *and judicial procedures* by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Id.* at 193 (emphasis added).

This Court further explained that, while the state may provide "procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by [government] authorities," such a property owner "would not be required to resort to those procedures" in order to ripen a takings claim because these procedures are "clearly remedial." *Id.* (quoting *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)).

The Commission -- the "government entity charged with implementing the regulations" at issue in this case -- reached a final, definitive decision regarding how it would apply the

regulations to Landgate's lot in February 1991.[13] Thus, Landgate's takings claim became ripe the instant the Commission rendered its decision. Under *Williamson County*, the fact that Landgate had a judicial remedy in the form of a petition for writ of mandate does not immunize the Commission from takings liability.[14]

In *MacDonald, Sommer & Frates, supra*, 477 U.S. at 351, n.7, this Court expressly stated that "a property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures" in order to obtain a determination of the extent of use that will be allowed. The majority opinion below requires Landgate to do just that -- continually litigate to determine the extent of allowable development on its lot.

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[13] It should be emphasized that the Commission's decision to deny Landgate's application was based in large part on its erroneous conclusion that Landgate's lot did not legally exist. Thus, unless Landgate acquiesced in the Commission's illegal assertion of jurisdiction of the lot line issue -- thereby waiving its right to seek judicial review of the decision under *County of Imperial v. McDougal*, 19 Cal.3d 505 (1977) -- the Commission's decision left open no other means of developing the property.

[14] This is not the first time the California courts have confused the *Williamson County* "final decision" requirement with the exhaustion doctrine. In the recent case of *Lechuza Villas West v. California Coastal Commission*, 60 Cal.App.4th 218, 234-235 (1997), the court concluded that the plaintiff's takings claim was not "final" within the meaning of *Williamson County* (and therefore not ripe) because the plaintiff had not yet "established" that it had a right to develop its property under state law in separate litigation concluded before it asserted its takings claim. The California Supreme Court denied review of this decision on April 1, 1998. A petition for writ of certiorari was filed with this Court on June 30, 1998 (case no. 98-30).

3. The Conflict with *Lucas*

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court addressed the question of whether South Carolina's 1988 Beachfront Management Act, which had the effect of barring plaintiff from erecting any permanent habitable structures on his two beachfront parcels, worked a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of just compensation. After observing that this Court has generally eschewed any "set formula" for determining whether a regulation has "gone too far," this Court described two discrete categories of regulatory action that are "compensable without case-specific inquiry into the public interest advanced in support of the restraint," as follows:

> The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property ... The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable uses of his land.*" 505 U.S. at 1015-16 (quoting *Agins, supra*, 447 U.S. at 260) (citations omitted).

The decision below is in direct conflict with this "categorical" rule. There is no dispute that the Commission's erroneous decision denied "all economically beneficial or productive use" of Landgate's property for a two-year period. Thus, under *Lucas*, inquiry into the public interest advanced in support of the Commission's decision is unnecessary and improper. Yet, that is exactly what the court has done below -- through the back door.

In *Landgate*, the court below fashioned a new and unsupported "exception" to the categorical rule in *Lucas*. In effect, the court held that litigation to set aside an agency's decision to deny a development permit will be considered "normal delay" if the decision, albeit erroneous, substantially advances a legitimate interest. App. 32a. In other words, the court took the "normal delay" language from *First English*, and then grafted the "substantial advancement" test onto the question of whether the delay was "normal."

The test devised by the court below was made out of whole cloth. There is no authority whatsoever for this new "exception" to the categorical rule of *Lucas*. Moreover, if consideration of the governmental interest sought to be advanced is irrelevant to the takings inquiry where all use had been denied, as *Lucas* teaches, there is no rational reason to consider these interests in the determination of whether a delay was "normal" and therefore not a taking. In fact, as noted above, the exception created by the court below would allow government agencies to escape temporary takings liability in all but those rare cases where the agency explicitly espouses its intent to deny all use. An exception that swallows the rule is no exception.

Finally, the "substantial advancement" test is inappropriate and unworkable in this context because it will require courts to inquire into the agency's "good faith" in rendering an illegal decision.[15/] Although the standard of review for determining

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[15/] For example, the court below concluded that the Commission rendered its erroneous decision in "good faith" because "Landgate has not demonstrated that the development delay between February 1991 and February 1993 was due to anything other than a bona fide dispute over the legality of Landgate's lot. Such delay is an incident of property

(continued...)

whether a dispute is "bona fide" is ostensibly an "objective" one, in practice this standard will be nearly impossible to apply, and will undoubtedly be rebuffed as improper inquiries into the subjective motivations of governmental officials.

Even if it is assumed, *arguendo*, that the substantial advancement test applies under these circumstances, it was not satisfied in this case. To conclude that the Commission's illegal, improper, and erroneous decision to deny Landgate's application for a development permit "substantially advanced a legitimate governmental interest" is contrary to both logic and common sense. What legitimate interest is served by subjecting a property owner to the Hobson's choice of either acquiescing in the agency's illegal "assertion of jurisdiction" or foregoing all beneficial use of the property? In an analogous context, this Court has already concluded that such illegal "pre-conditions" do not substantially advance any legitimate governmental purpose and are therefore unconstitutional. *See Nollan, supra,* 483 U.S. at 839 ("We therefore find that the Commission's imposition of the permit condition [requiring dedication of an easement across plaintiff's lot] cannot be treated as an exercise of its land-use power...").

[15/](...continued)
ownership and not a taking of property." App. 34a. On the other hand, the court below offered the following example of a "bad faith" dispute: "[A] government agency may not evade the takings clause by fabricating a dispute over the legality of a lot, or by otherwise arbitrarily imposing conditions on development in order to delay or discourage that development." App. 31a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN M. REZNIK
Counsel of Record

JOHN M. BOWMAN
JEFFER, MANGELS, BUTLER
& MARMARO LLP
2121 Avenue of the Stars
Tenth Floor
Los Angeles, California 90067
(310) 203-8080
Counsel for Petitioner

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No. 98 183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LANDGATE, INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

BENJAMIN M. REZNIK
(Counsel of Record)
JOHN M. BOWMAN
JEFFER, MANGELS, BUTLER
& MARMARO, LLP
2121 Avenue of the Stars
Tenth Floor
Los Angeles, California 90067
(310) 203-8080
Counsel for Petitioner.

July 28, 1998

Washington, D.C. • THIEL PRESS • (202) 328-3286

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APPENDIX A

IN THE SUPREME COURT OF CALIFORNIA

FILED: Apr 30, 1998
SUPREME COURT
Robert Wandruff Clerk

LANDGATE, INC., et al., Plaintiffs and Appellants, v. CALIFORNIA COASTAL COMMISSION, Defendant and Appellant.	S059847 Ct. App. 2/1 B084315 L.A. County Super. Ct. No. BC 024391

In *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 321,[1] the court held that "where the government's activities have already worked a taking of all use

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1/ The full name of this case is *First English Lutheran Church of Glendale v. County of Los Angeles*. We will hereinafter follow the common practice of referring to the case as *First English*.

= SEE DISSENTING OPINIONS =

of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which a taking was effective." In so holding, the court cautioned that the holding did not extend to "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." (*Ibid.*) In the present case, we consider whether a delay in the issuance of a development permit partly owing to the mistaken assertion of jurisdiction by a government agency is a type of "temporary taking" contemplated in *First English*, or if it is more in the nature of a "normal delay" that does not constitute a taking. The Court of Appeal held that a temporary taking had indeed occurred. We conclude that the present case falls squarely into the category of a normal delay rather than a temporary taking, and therefore reverse the Court of Appeal.

I.

Because of the complexities of this case, a somewhat detailed recitation of the facts is in order. The case centers on the efforts of plaintiff Landgate[2] to build a large home in the Malibu Hills. Landgate's predecessor in interest owned two long, thin parcels or "lots" oriented in a north-south direction. The northern portions were sloped, the southern portions flat. One of the lots contained a single family home on the southern portion. The coast lay to the south of these lots.

In the mid-1980's, the County of Los Angeles (the County) planned to provide an east-west road that would run through the two lots. The landowner and the County agreed that, in

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2/ According to Landgate's first amended complaint, Peter and Punte Bogart "owned and controlled" Landgate, and held a life estate in the subject property.

exchange for the owner's dedicating portions of the parcels for the roadway easement, the County would reconfigure the lots into a single, sloped 2.45-acre lot north of the road and a single, flat 1.56-acre lot south of the road, each still zoned for a single family home. The County completed the road improvement, designated as De Butts Terrace, and formally approved a lot re-configuration, which was recorded July 5, 1989.

The lots in question are and at all relevant times were in the coastal zone (Pub. Resources Code, §30103) and therefore subject to the development restrictions imposed by the California Coastal Act of 1976 (Coastal Act), Public Resources Code section 30000 et seq. The act requires local governments within the coastal zone to prepare Local Coastal Programs (LCP) containing a Land Use Plan (LUP) and a set of implementing ordinances designed to promote the act's objectives of protecting the coastline and its resources and maximizing public access. (Pub. Resources Code, §§ 30001.5, 30512, 30513.) In general, the act provides that, until a certified LCP is approved by the Coastal Commission (Commission), authority to approve development lies with the Commission. (*Id.*, § 30519.) At the time the pertinent events took place, the Commission had approved the County's LUP for Malibu but had not yet approved the LCP. Therefore, the Commission retained jurisdiction over the issuance of coastal development permits for the area in which the subject property is located.

In October 1990, Landgate bought the sloped northern lot and received County approval in concept for grading and building plans for a single-family home to be built on the property. Landgate applied to the Commission for permits to build the house and related structures. Landgate's permit application sought approval of a 9,036-square-foot home and

guest house, a swimming pool and septic tank and 8,500 cubic yards of grading. As originally proposed, the house was 44 feet above existing grade. Before the Commission's initial consideration of the development, Landgate modified its proposal by reducing the house to 7,500 square feet, eliminating the guest house and reducing the proposed grading to 4,300 cubic yards.

At its December 1990 and February 1991 meetings, the Commission was presented with staff reports objecting to several aspects of the project. First, staff was concerned with visual impacts of the house, since it was located next to Escondido Canyon, "a highly scenic area which includes a hiking trail to Escondido Falls. The proposed project is located south and west of Escondido Canyon and is visible from the Escondido Falls Trail and the Escondido Falls." The preservation of scenic and recreational resources of the coastal area is encouraged by both the Coastal Act and the Malibu LUP. (See Pub. Resources Code, § 30251.) Staff concluded that the visual impact of Landgate's proposed development would be significant both because of its location on the lower, northern lot closer to the trail and falls, and because of the 44-foot height, 9 feet above the allowable height contained in the Malibu LUP.

Second, staff found the amount of grading required of the proposed project to be objectionable. "In essence, the applicant is creating a large level pad area on a hillside lot, instead of designing the house to conform with the natural topography." The grading plan was contrary to the Malibu LUP, which called for the minimization of grading for all new development "to ensure the potential negative effects of runoff and erosion on [visual] resources are minimized." Staff found that these problems would be alleviated if the house was built on the southern side of De Butts Terrace.

These concerns and objections were inextricably linked to staff's third concern, that the Commission had not approved the lot line adjustment obtained from the County by Landgate's predecessor in interest. As noted, prior to the approval of the lot line adjustment, the length of the lots ran in a north to south direction standing side-by-side east to west. If the old lots had remained, then development could have been directed to the more topographically and visually suitable southern portion of the property. Staff further concluded that the lot line adjustment had been illegal. It reached its conclusion as follows: It first observed that section 30106 of the Public Resources Code contains a broad definition of "development" for which a coastal development permit is necessary. " 'Development' means, on land, in or under water, the placement or direction of any solid material or structure; discharge or disposal of any drenched material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, *subdivision pursuant to the Subdivision Map Act . . . and any other division of land, including lot splits,* except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use . . . ." (*Ibid.*, italics added.) Staff then cited a 1986 memorandum from the Attorney General circulated to the Commission concluding that "[a] lot line adjustment is a form of a lot split. In some instances, a lot line adjustment may be so minor as to warrant the Commission finding that it is de minimis and qualifies for a waiver pursuant to section 30624.7. In other instances a lot line adjustment may be such that it does bring about a major change in the density or intensity of use of land. In such a case it would fall within the definition of development in section 30106, and would necessarily require a coastal development permit."

The staff report then considered whether the lot line adjustment in question "involves a major change in the density or intensity of land-use." It concluded that while a lot line adjustment did not alter the density of development it would alter its intensity: "The topography north of De Butts Terrace is relatively steep and not suited to development. This proposed project would change the intensity of land-use in this area by allowing development of the north side of the road. . . . Staff believes that the least environmentally damaging site for development is on the coastal [i.e. southern] side of De Butts Terrace and that the original lot configuration of long thin parcels extending across the road should not be altered."

The Commission considered the various issues raised by staff at its December 13, 1990, meeting and voted to continue the matter because of questions concerning the legality of the lot line adjustment. According to the declaration of Landgate's engineer/representative in support of its motion (Petrovsky Declaration), "once the lot line adjustment issue was raised . . . staff would not negotiate with regard to issues of the size of home, grading, etc. Instead, the legality of the lot became the focus of their attention." Landgate reapplied for a coastal development permit proposing the same project as described above, but adding a request for Commission approval of the County lot line adjustment.

At its February 1991 meeting the Commission denied Landgate's application. It adopted staff findings that the proposed house and related structures would produce excessive soil, grading, and visual degradation.[3] Immediately

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3/ According to Commission regulations, a vote by the Commission that is "consistent with [the] staff recommendation and not otherwise modified, . . . shall be deemed to adopt the findings and conclusions

(continued...)

after the vote, Commissioner Glickfeld commented on Los Angeles County's perceived unwillingness to comply with the Coastal Act: "I really regret the situation that this applicant has been put in because of Los Angeles County's refusal to comply with the Coastal Act and I hope that . . . our staff counsel could be directed to communicate that very clearly with Los Angeles County, bring their response back to us and pursue, if necessary, litigation to insist that the County of Los Angeles comply with the law in this matter." The chief counsel stated that he would prepare a letter to the County.

In March 1991, Landgate filed a petition for writ of mandate against the Commission asserting that the Commission had no jurisdiction over the lot line adjustment. The petition was conjoined with a complaint asserting a taking of property without just compensation and a denial of civil rights, seeking damages and declaratory relief. The mandate petition and takings complaint were severed, with the latter reserved for later adjudication.

Meanwhile, in April 1991, the Commission heard Landgate's request for reconsideration of its project. Grounds for reconsideration of an application exist when "there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing . . . or that an error of fact or law has occurred which has the potential of altering the initial decision." (Pub. Resources Code, § 30627, subd. (b)(3).) At that meeting, Landgate's representative presented a new version of the proposed

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3/ (...continued)
recommended by the staff." (Cal. Code Regs., tit. 14, § 13092, subd. (d).) Thus, the Commission, in denying the application consistent with the staff report, is deemed to have adopted the staff's proposed findings discussed above.

residence that would be only 32 feet above the existing natural grade, would have 1,000 cubic yards of grading, and would make other changes in order to conform the appearance of the house to its natural surroundings. Commission staff opined that the new proposal was more appropriately presented to the Commission as a new project, but did not constitute "new evidence" or "error of fact or law" that would be grounds for reconsidering its February 1991 denial of the project. Staff also told the Commission that "part of the basis for your denial [of the project] was a lot line adjustment and . . . we told them even if they make these modifications we'll still recommend denial." The Commission's legal counsel told the Commission: "Without a lot line adjustment some of these revisions are I think irrelevant." He also stated: "This project does not work, if you please, without that lot line adjustment." He further stated that, in light of the action that Landgate had filed before the request for reconsideration contesting the Commission's jurisdiction over the lot line adjustment, "my advice would be to continue to maintain the position you have maintained before and allow the court system to determine the dispute that presently exists between the Commission and [Landgate] with regard to that." The Commission voted to deny reconsideration.

The above mentioned litigation proceeded and in October 1991 the trial court granted Landgate's petition for writ of mandate. Specifically, the trial court set aside the Commission's action of February 1991 denying Landgate's application and ordered the Commission to reconsider the application. The court found that, in view of the factual circumstances in this case, the definition of "development" as found in Public Resources Code section 30106 "does not include the lot line adjustment approved and recorded by the County of Los Angeles in 1989 with regard to the subject property. Therefore, upon remand to the Commission, the

Commission must consider [Landgate's] application without any reference or consideration of a lot line adjustment. The Commission is to consider the subject property to be a legal lot." The court did not order the approval of any particular development proposal.

The Court of Appeal affirmed the trial court in an unpublished decision in December 1992. In arriving at its conclusion, the court found significant the fact that Landgate had purchased a lot that had been approved by the County and had been recorded, that the Commission had approved the construction of the road, De Butts Terrace, that made the then-existing lot configuration impractical and necessitated the lot line adjustment, and that the Commission's position with respect to the lot line adjustment would render Landgate's property valueless. In essence, it held that Public Resources Code section 30106 did not authorize the Commission to invalidate a legally recorded lot line adjustment to which the Commission, by its actions and inaction, had given tacit approval, when an innocent purchaser would stand to lose all value from its lot from such invalidation. The court also questioned the Commission's assertion that any building on Landgate's lot was inconsistent with the Coastal Act, citing other development north of De Butts Terrace that the Commission had approved. In its conclusion, it emphasized that the Commission "retained its ability to regulate and approve any proposed building on the lot."

In February 1993, the Commission again considered Landgate's project, which had been modified by reducing grading to 2,893 cubic square yards, by reducing height to 35 feet above existing grade, and by reducing the fill slope, among other changes. It required further changes in the project to address the visual impacts and erosion problems that it had earlier found to be objectionable. Specifically, it imposed a

height limitation of 28 feet above existing grade on the proposed residence, required a drainage plan as well as color restrictions and landscape requirements consistent with the scenic preservation with which the Commission was concerned. Landgate did not challenge these conditions.

Subsequently, Landgate moved for summary adjudication of its still-unresolved takings claim. It contended that the Commission's erroneous assertion of permit jurisdiction over the lot line adjustment prevented it from making any economically viable use of its property for the period prior to the Commission's approval of its project in February 1993. The Commission moved for summary judgment, contending that its jurisdictional error did not constitute a taking of Landgate's property. The trial court granted Landgate's motion, ruling that the Commission had temporarily taken Landgate's property from February 1991 to February 1993. In its statement of decision, the trial court declared that "Landgate's third cause of action for taking of property without just compensation . . . is meritorious as a matter of law . . . because Landgate has been deprived, at least temporarily, of all economically viable or productive use of its property insofar as Landgate, at least temporarily, could not legally obtain any valid permits for approvals to construct any project on its property as a result of the Commission's actions." The trial court also denied the Commission's motion for summary judgment. After a bench trial on the issue of damages, the trial court awarded takings damages of $155,657 for the period between February 1991 and February 1993. The Commission appealed the grant of summary adjudication and the award of attorney fees. Landgate filed an appeal contesting the amount of damages and filed a separate notice of appeal from the trial court's award of costs and attorneys fees.

The Court of Appeal affirmed the trial court's grant of summary adjudication in Landgate's favor. It appeared to accept the Commission's assertion that reasonable mistakes made by a government agency in the development approval process do not necessarily constitute takings. But, as it stated: "[W]hat we cannot accept is the Commission's characterization of the treatment of Landgate here as the reasonable result of a 'mistake.' Nothing in the record suggests that the lot line adjustment issue arose out of anything other than the Commission's ongoing jurisdictional spat with the County of Los Angeles combined with a desire to prevent Landgate from building on its parcel. Instead, the overwhelming sense of the record is that by its insistence that the lot itself was illegal, the Commission put Landgate in a situation which was not of its own making and which Landgate could do nothing to cure. In short, this is not a case of bureaucratic bungling, but the declaration of war between governmental behemoths in which the inevitable casualty was to be a noncombatant, Landgate." It also affirmed the trial court's award of damages. We granted review to address the important question of whether the Commission's apparently mistaken assertion of jurisdiction of the lot line adjustment in this case led to a temporary taking of Landgate's property.[4]

4/ We note at the outset that this case comes to us after a grant of Landgate's summary adjudication motion on its claim that its property was taken without just compensation and a denial of the Commission's motion for summary judgment. Thus, we undertake independent review of the record to determine whether a triable issue of fact exists as to the takings claim. (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973, fn. 7.)

II.

A.

Before addressing the present issue, we briefly summarize pertinent takings jurisprudence. In determining whether a government regulation works a taking of property under the Fifth Amendment to the United States Constitution, the United States Supreme Court has generally eschewed any "set formula" for determining how far is too far, preferring to engage in " 'essentially ad hoc, factual inquiries.' " (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015 (*Lucas*).) The court has stated that the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations." (*Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 124.) The court has also stated that "the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests.' " (*Lucas, supra*, 505 U.S. at p. 1016.) The court has furthermore described "at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation. . . . [¶] The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." (*Id.* at p. 1015.)

In *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 275, we had held that the sole remedy for government regulation that

effects a taking of property is an administrative mandamus overturning the regulation rather than an award of damages. That holding was repudiated by the United States Supreme Court in *First English, supra*, 482 U.S. 304. In *First English*, the plaintiff operated a campground on which lay a number of buildings that had been destroyed by flood. An interim Los Angeles County ordinance prohibited construction or reconstruction of any building or structure in an interim flood protection area that included the plaintiff's land. The court assumed for purposes of the appeal that the ordinance deprived the plaintiff of all economically beneficial use of its property. It then held that such deprivation constituted a temporary taking of the property for which compensation must be paid. " '[T]emporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." (*Id.* at p. 318.) Thus, the court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (*Id.* at p. 321.)

The *First English* court emphasized the narrowness of its holding. "We . . . point out that the allegation of the complaint which we treat as true for purposes of our decision was that the ordinance in question denied appellant all use of its property. We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." (*First English, supra*, 482 U.S. at p. 321.)

Consistent with this implied limitation on the temporary takings doctrine, the United States Supreme Court has also

"made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. [Citation.] The reasons are obvious. The requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired." (*United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, 126-127.) Stated in other terms, whereas "the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole' " (*First English, supra*, 482 U.S. at pp. 318-319, fn. omitted), a rational permit regulation scheme is imposed on the public as a whole to ensure the orderly development of real property, benefiting as well as burdening property owners.

Finally, the Supreme Court has emphasized that the question whether property has been taken is not ripe for decision until a government agency has rendered a final decision on the use to which the property in question may be put. "Our reluctance to examine taking claims until . . . a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although '[t]he question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty' [citation], this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. [Citations.] Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."

(*Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 190-191; see also *McDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 348.)

B.

The present case poses the issue of whether a legally erroneous decision of a government agency during the development approval process resulting in delay constitutes a temporary taking of property. Virtually every court that has examined the issue has concluded, for various reasons and under various theories, that a regulatory mistake resulting in delay does *not*, by itself, amount to a taking of property. (See *Littoral Development Co. v. San Francisco Bay Conservation etc. Com.* (1994) 33 Cal.App.4th 211, 221-222 (*Littoral Development Co.*); *Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060; 1080; *Jacobi v. City of Miami Beach* (Fla.Dist.Ct.App. 1996) 678 So.2d 1365; 1367; *Cannone v. Noey* (Alaska 1994) 867 P.2d 797; 801; *Dumont v. Town of Wolfeboro* (N.H. 1993) 622 A.2d 1238; 1244; *Tabb Lakes, Ltd. v. U.S.* (Fed. Cir. 1993) 10 F.3d 796; 801-802; *Steinbergh v. City of Cambridge* (Mass. 1992) 604 N.E.2d 1269, 1274-1277; *Smith v. Town of Wolfeboro* (N.H. 1992) 615 A.2d 1252; 1257-1258; *1902 Atlantic Ltd. v. United States* (1992) 26 Ct.Cl. 575; *Lujan Home Builders v. Orangetown* (1991) 568 N.Y.2d 850, 851.)

In *Steinbergh v. City of Cambridge*, *supra*, 604 N.E.2d 1269 (*Steinbergh*), for example, the Supreme Judicial Court of Massachusetts considered the claim of a landlord suing the city for takings damages stemming from a city regulation that restricted the conversion of rental units into condominiums. The court had, in a previous decision, declared that the regulation exceeded the city's statutory authority under the state's rent control statute and was therefore invalid. The

plaintiff claimed that he suffered damages from the decline in the condominium market during the period of the delay that resulted from the necessity of mounting a legal challenge to the invalid rent regulation. The court first concluded that the regulation in question was neither a physical invasion of property nor a deprivation of all viable use, nor a substantial interference with the property owner's distinct investment-based expectations. (See *id.* at p. 1274.) The court likened the delay experienced in the case to delay "that commonly occurs in seeking regulatory approvals for changes in local ordinances and by-laws, which are government-imposed processes that have not traditionally been viewed as constituting regulatory takings." (*Id.* at p. 1275.) "It is, of course, true that in this case the delay was caused, not by the necessity of obtaining mandated governmental approvals, but by the process of presenting a judicial challenge to a municipal regulation. That legal challenge resulted in invalidation of the regulation as beyond the authority of the city to adopt, but not because the municipal regulation was unconstitutional as violating rights to due process or equal protection of the laws. The plaintiffs make no reasoned argument that, simply because a municipal regulation is not authorized by law, there is a compensable temporary taking of property, even though the regulation restricts the sale and reduces the market value of the property until the regulation is successfully challenged in court." (*Ibid.*)

The *Steinbergh* court then considered the argument that the invalidated regulation did not " 'substantially advance legitimate state interests' " and therefore was a taking of property under the test articulated by the Supreme Court. (*Steinbergh, supra*, 604 N.E.2d at p. 1275, quoting *Agins v. Tiburon* (1980) 447 U.S. 255, 260.) Although it had found in its previous decision that the condominium conversion regulation was insufficiently connected with rent control, and

therefore not impliedly authorized by the state rent control statute, it rejected the argument that this state law defect translated into a constitutional flaw. It found that the regulation was "a 'logical and sufficiently well-founded approach to dealing' with a problem [of removal of rental units from the market] for us to find . . . that the 'essential nexus' between the state's interest and its chosen means is present in this case." (*Steinbergh*, *supra*, 604 N.E.2d at p. 1277.) Therefore, despite the invalidity of the regulation, it concluded that the plaintiffs had not met their constitutional burden of demonstrating that the regulation failed to substantially advance a legitimate state interest.

Our own Court of Appeal has reached a similar conclusion. (See *Del Oro Hills v. City of Oceanside*, *supra*, 31 Cal.App.4th 1060, 1080; *Littoral Development Co.*, *supra*, 33 Cal.App.4th 211.) In *Littoral Development Co.*, the Court of Appeal considered a regulatory taking claim against the San Francisco Bay Conservation and Development Commission (BCDC). It had decided in a previous decision that BCDC, which was given jurisdiction over development of property adjacent to San Francisco Bay subject to "tidal action" (Gov. Code, § 66610, subd. (a)), had incorrectly asserted jurisdiction over the landward two-thirds of the plaintiff's property in Marin County, thereby delaying the construction of a hotel on that property. It had accordingly reversed the trial court's decision upholding that jurisdiction. Nonetheless, it rejected the takings claim, stating: "Under the circumstances, we cannot find any regulatory 'taking' of any property, merely because delay resulted from factual or legal uncertainties which temporarily clouded the respective limits of BCDC's and Marin County's regulatory jurisdiction. . . . [¶] While we recognize that, on very different facts, a transient and impermanent interference in real property use due to egregious bureaucratic overreaching may arguably constitute a compensable

temporary taking, BCDC's actions here were facially valid and supported by a plausible though erroneous legal argument which the trial court accepted. We decline to hold that such a taking occurred here or occurs every time a land-use agency makes an erroneous decision which is ultimately overturned in part on appeal." (*Littoral Development Co.*, *supra*, 33 Cal.App.4th at pp. 221-222.) It also found significant that the plaintiff still had some unspecified use of the property during the pendency of legal proceedings. (*Ibid.*)

We substantially agree with the Supreme Judicial Court of Massachusetts, with our Court of Appeal, and with the other courts cited above that an error by a governmental agency in the development approval process does not necessarily amount to a taking even if the error in some way diminishes the value of the subject property, any more than the commission of state law error during a criminal trial is an automatic violation of the due process clause. (See, e.g., *Estelle v. Maguire* (1991) 502 U.S. 62, 71-73; *People v. Carpenter* (1997) 15 Cal.4th 312, 393.) If the error is of a particular constitutional type -- the passage and enforcement of a law or regulation that deprives property of all value -- then the teaching of *First English* is that such an error is a compensable taking. But government land use regulations and decisions such as those cited above in *Steinbergh* and *Littoral Development Co.*, which, despite their ultimately determined statutory defects, are part of a reasonable regulatory process designed to advance legitimate government interests, are not takings of property under the Supreme Court's doctrine reviewed above. (See *Agins v. Tiburon*, *supra*, 447 U.S. at p. 260.)

An analogous situation may be found when the government initiates condemnation proceedings against an undeveloped tract of land, thereby bringing the development process to a standstill. We have held that when a government agency later

abandoned such proceedings, it was not liable under the takings clause, even when the proceedings caused substantial delay in the development approval process and led to losses in the property's value. (*Agins v. City of Tiburon, supra*, 24 Cal.3d at pp. 271, 277-278 [eminent domain proceeding active for almost one year before abandonment].) The United States Supreme Court affirmed this aspect of our *Agins* decision, agreeing that we had "correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking. [Citation.] Even if the appellants' ability to sell their property was limited during pendency of the condemnation proceeding, the appellants were free to sell or develop their property *when the proceedings ended.* Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.' " (*Agins v. Tiburon, supra*, 447 U.S. at p. 263, fn. 9, italics added.) Just as an aborted condemnation proceeding that delays development is an incident of ownership and not a taking, so the mistaken assertion of jurisdiction over a development is part of the development approval process, and development delays that result therefrom may be imposed on the developer rather than the general taxpayer without violating the United States Constitution.[5]

5/ The principle that a government agency will not be liable in damages for state law errors committed in the development approval process is congruent with Government Code section 818.4, which provides that a public entity cannot be held liable "for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public

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The Court of Appeal did not hold that all governmental mistakes in the land use process amounted to takings. The Court of Appeal held rather, as noted above, that the Commission's February 1991 decision to deny Landgate's development application and its position on the lot line issue was not the "reasonable result of a 'mistake' " but rather arose out of a "jurisdictional spat with the County of Los Angeles combined with a desire to prevent Landgate from building on its parcel," and a "declaration of war between governmental behemoths in which the inevitable casualty was to be a noncombatant, Landgate."

The Court of Appeal erred in its attempt to divine, through the statements of Commissioners and commission staff and through circumstantial evidence, the "true," illegitimate, motive for the Commission's decision to deny Landgate's development permit. The proper inquiry is not into the subjective motive of the government agency, but whether there is, objectively, sufficient connection between the land use regulation in question and a legitimate governmental purpose so that the latter may be said to substantially advance the former. (See *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 836-837 (*Nollan*); *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391 (*Dolan*).) This type of objective inquiry is consistent with the principle that courts do not delve into the individual purposes of decision-makers in a quasi-adjudicative proceeding, but rather look to the findings made by the government agency and determine whether these are based on substantial evidence. (*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 779; *Topanga Assn. for a Scenic*

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entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked."

Community v. County of Los Angeles (1974) 11 Cal.3d 506, 515-516; see also *United States v. Morgan* (1941) 313 U.S. 409, 422.) Thus, we must determine not whether a sinister purpose lurked behind the Commission's decision, but rather whether the development restrictions imposed on the subject property substantially advanced some legitimate state purposes so as to justify the denial of the development permit.

Moreover, the cases suggest that judicial review of governmental conditions imposed upon development will be more deferential when the conditions are simply restrictions on land use and not requirements that the property owner convey a portion of his property (see *Nollan, supra*, 483 U.S. at p. 841; *Dolan, supra*, 512 U.S. at pp. 388-391) or pay development fees imposed on a property owner on an individual and discretionary basis (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 876). In the present case, neither conveyances nor individualized development fees are at issue.

The Commission's denial of Landgate's permit in February 1991 did indeed appear to substantially advance legitimate governmental interests and to be supported by substantial evidence. The Commission's findings articulated three objections to the project as proposed. First, the Commission was concerned that the large house, 44 feet above natural grade and 9 feet above the maximum allowable height set forth in the Malibu LUP, would be unsightly when viewed from Escondido Trail and Escondido Falls. Second, the Commission was concerned that excessive grading on the north slope, where the house was to be built, was contrary to the Malibu LUP, which called for the minimization of grading for all new development "to ensure the potential negative effects of runoff and erosion on [visual] resources are minimized." These are unquestionably legitimate government purposes (see *Ehrlich v. City of Culver City, supra*, 12 Cal.4th

at p. 886 [promotion of scenic and aesthetic objectives within the scope of the police power]) and there is substantial evidence in the record in support of the reasonableness of the Commission's position. Indeed, Landgate does not challenge the conditions ultimately imposed by the Commission requiring the reduction of building height and total amount of grading.

The third Commission objection, the improper lot line adjustment, was principally based not on formal, jurisdictional or bureaucratic grounds, but on the view that such adjustment would lead to an intensification of the environmental impacts with which the Commission was concerned. Based on our review of the record, as discussed above, the Commission's position appears reasonable and supported by substantial evidence. It found that the placement of the house on the north slope would make it more unsightly, bringing it closer to Escondido Trail and Escondido Falls, and would also obviously increase the need for grading -- and with it the potential for erosion -- in order to create a flat pad for the proposed residence on a sloping surface. The Commission's preference for construction on the flat south side of De Butts Terrace was therefore reasonable. In sum, the denial of a development permit in February 1991 on the three enumerated grounds advanced legitimate governmental interests in minimizing erosion and unsightly development in the coastal area.

We do not agree with the Court of Appeal that anything in the record establishes that the Commission was motivated in its decisions by a "jurisdictional spat" with Los Angeles County. The Court of Appeal quotes the statement made by one of the commissioners after denial of the application that "the county's refusal to recognize our right to review lot line adjustments" was "an issue that had come before the Commission many times in the Malibu area." She added that it was "really time

to become extremely serious about this" and asked that staff counsel be directed to communicate with the County on the topic. But the fact that the commissioner expressed frustration over the County's failure to recognize the Commission's jurisdiction does not suggest that the primary or even secondary reason for the Commission's vote was to teach Los Angeles County some sort of jurisdictional lesson.

Nor are we persuaded by the Court of Appeal's conclusion that the Commission's decision must not have been based on legitimate environmental concerns because it "could have imposed special conditions on matters such as height in February 1991, but failed to issue the permit until after the lot line question was resolved in February 1993." From the Commission's point of view, the environmental impacts of the project could have been reduced if the original lot line configuration was maintained. Once the Commission was confronted by a court ruling that made restoration of the original configuration impossible, it settled for what it regarded as the next best alternative: permitting development on the north side of De Butts Terrace, but with conditions imposed to reduce these environmental impacts. There is therefore no inconsistency between the Commission's environmental concerns and the respective positions it adopted throughout the development approval process.

The Court of Appeal also concluded that since the Commission may have approved or was going to approve two homes on the same sloping north side as Landgate's parcel, "those approvals are clear indications that but for the lot line adjustment, Landgate's application to build a house and related structures on its property could and would, through the normal negotiation process, have been approved by February 1991 or shortly thereafter." But it is clear that the Commission had a policy to concentrate development in the area on the flat south

side of De Butts Terrace. The fact that there may have been exceptions to this policy, based on considerations particular to these specific projects, for reasons not present in the current administrative record and about which we can only speculate, does not negate the fact that the Commission had a rational policy preference for concentrating development on the south side of De Butts Terrace.

It would be, of course, a different question if, even though the Commission's position on the lot line adjustment substantially advanced a legitimate state interest, that position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it. Such a delaying tactic would not advance any valid government objective. Here, however, as discussed, the Commission's position on the lot line adjustment issue was based on a construction of Public Resources Code section 30106 and the meaning of the term "development" contained therein that was not unreasonable. As discussed, that section defines development over which the Commission will have jurisdiction broadly to include "change in the density or intensity of use of land, including, but not limited to, . . . lot splits." Without deciding questions not before us,[6] the Commission's conclusion, following the Attorney General's advice, that section 30106 gave it authority to deny the lot line adjustment was "supported by a plausible though [perhaps] erroneous legal argument" and therefore not the basis of a taking. (*Littoral Development Co.*, *supra*, 33 Cal.App.4th at p. 221.)

6/ The Court of Appeal's prior, unpublished decision regarding the lot line issue is now final and may not be relitigated. (See *Kavanau v. City of Santa Monica* (1997) 16 Cal.4th 761, 779.) We do not necessarily endorse that decision, nor are we bound by its reasoning. (*Id.* at pp. 777-779.)

Indeed, the Court of Appeal's earlier decision on the lot line issue was based not on the Commission's general lack of authority over such issues, or even on the fact that invalidation of the lot line would deprive Landgate of property, but rather on the court's determination that the Commission's earlier course of conduct had constituted a kind of acquiescence to the lot line adjustment. Although the Court of Appeal may have been correct on that point, and the Commission mistaken given the peculiar facts of this case, its position was not so objectively unreasonable as to give rise to the inference that it was adopting that position solely for purposes of delay or some other illegitimate reason.

C.

Landgate's argument that the Commission temporarily took its property rests on somewhat different grounds than those on which the Court of Appeal holding was based. Landgate argues that regardless of whether the Commission's lot line adjustment condition substantially advanced a legitimate state interest, the imposition of such condition was nonetheless a taking because it temporarily deprived Landgate's property of all value. Landgate contends that from the time the development permit was denied in February 1991 until the time it was approved in February 1993 after the lot line issue had been resolved by litigation, the development process was at a standstill, effectively depriving the property of all economic benefit. Landgate cites the Petrovsky Declaration, discussed above, as evidence that the Commission refused to continue negotiation with Landgate as long as the jurisdictional dispute over the lot line adjustment was pending. Landgate argues that the Commission's actions amount to a denial of all economically beneficial use of the land and thus is a categorical taking (*Lucas*, *supra*, 505 U.S. at p. 1016) even if only temporary. (*First English*, *supra*, 482 U.S. at p. 320.)

Of course, each time there is a delay in the development process, the delay may be said to temporarily deprive the developer of undeveloped property of use of that property. From the would-be developer's point of view, the impact of ordinary delay due to a governmental mistake on the one hand, and denial of all feasible use on the other, may be identical. But as discussed above, for purposes of the takings doctrine the two types of governmental action are quite different. (See *First English, supra*, 482 U.S. at p. 321.)

Landgate asserts, however, that what is at issue in this case was not a normal development delay due to the Commission's mistake, but in fact a final Commission decision to ban all development of Landgate's property, a position the Commission was forced to abandon only because it lost on the jurisdictional question. More specifically, Landgate contends the Commission's position that the former lot lines be preserved, combined with its insistence that no development take place north of De Butts Terrace, rendered Landgate's lot valueless, because its lot was situated wholly to the north of De Butts Terrace. To state the argument differently, if, for example, a municipality's ordinance denies a parcel of real property all economically feasible use, it would arguably be no defense to a temporary takings claim to show that the ordinance was eventually invalidated for being inconsistent with the municipality's general plan.[7] Similarly, Landgate

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7/ The Commission and some of its amici curiae argue that a government exercise of power that is beyond its jurisdictional authority can *never* be a taking. The argument is based on the principle that the takings clause only authorizes compensation for "a taking of private property for *public* use," and that when a government's action is ultra vires because the agency has exceeded its statutory authority, it cannot as a matter of law be said to have taken property for public use. Some

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contends in effect that its failure to make progress toward developing its property between February 1991 and February 1993 was due not to an interim uncertainty created by the jurisdictional dispute with the Commission, but to a decision by the Commission in February 1991, and subsequently, to deny all economically feasible use of Landgate's property, a denial that was the administrative equivalent of an ordinance banning all development on the subject property, such as was found in *First English*.

In considering whether the Commission's actions constituted in fact a denial of all economically feasible use, we first note that the Supreme Court has characterized the circumstances under which a categorical taking occurs under these circumstances as "extraordinary" and "relatively rare." (*Lucas*, *supra*, 505 U.S. at pp. 1017, 1018.) In *Lucas*, for example, the court was confronted with South Carolina's Beachfront Management Act, which authorized a government agency to establish a coastal zone in which no development could occur, and which "had the direct effect of barring [the property

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7/ (...continued)
federal courts appear to accept this rationale, holding that the Tucker Act (28 U.S.C. § 1491), creating a statutory procedure by which those who have had their property taken by the United States Government may file a claim for compensation, does not cover " 'an executive taking not authorized by Congress, expressly or by implication.' [Citations.] ('[B]efore a compensable taking can be found by the court, there must be some congressional authorization, expressed or implied, for the particular taking claimed.') Thus, claimant must concede the validity of the government action which is the basis of the takings claim to bring suit under the Tucker Act. . . ." (*Tabb Lakes, Ltd. v. U.S.*, *supra*, 10 F.3d at p. 802-803.) Because we decide the issue on other grounds, we do not decide the question whether the action of a government agency that exceeds its statutory authority can ever be a compensable taking.

owner] from erecting any permanent habitable structures on his two parcels." (*Id.* at p. 1007.) The property owner bears the burden of showing that the government action in question denied it economically beneficial use of its land. (*Id.* at p. 1016, fn. 6.)[8]

Landgate ignores the critical difference between this case and *Lucas* and *First English*. An understanding of this difference begins with the principle that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." (*United States v. Riverside Bay Homes, Inc.*, *supra*, 474 U.S. at p. 126.) Part of that regulatory process is the imposition of certain procedural conditions and substantive requirements on development. These conditions can include such matters as the filing of a proper subdivision map (Gov. Code, § 66426), installation of proper sewer facilities, (*id.*, § 66483), or the requirement that the development undergo the process mandated by the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). A necessary corollary of the above quoted principle is that a government agency may deny a development permit when the reasonable conditions imposed on development are not met without that denial constituting a taking. As the United States Supreme Court has stated, an essential prerequisite to the assertion of a takings claim is "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." (*McDonald, Sommer & Frates v. Yolo County*, *supra*, 477 U.S. at p. 348.) If a would-be developer fails to meet legitimate conditions for obtaining a development permit,

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8/ We also note that in *First English* on remand, the Court of Appeal held that no taking of property had resulted because the owner was still permitted significant use. (*First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1372.)

then a government agency's refusal to issue such a permit would by no means be a "final and authoritative determination of the intensity of development legally permitted on the subject property," but merely a conditional denial. And, as reviewed in the preceding part of this opinion, the imposition of a development condition is not a constitutional violation merely because that condition is subsequently shown to have been erroneously imposed.

In California, one of the conditions of obtaining a permit for development within the coastal zone is the procurement of a coastal permit. The Commission's authority to approve development is concurrent with the authority of local jurisdictions, and thus compliance with the Subdivision Map Act does not excuse compliance with the Coastal Act. (See Pub. Resources Code, § 30106; see also *South Central Coastal Regional Com. v. Charles A. Pratt Construction Co.* (1982) 128 Cal.App.3d 830, 844-846.) This approval requirement extends to "any . . . division of land" that affects the density or intensity of development. (Pub. Resources Code, § 30106.) As discussed, Landgate's development was denied because of the Commission's plausible, though perhaps legally erroneous, position that Landgate or its predecessor failed to comply with one of the conditions of obtaining a coastal development permit by illegally reconfiguring the lot boundaries. Its rejection of Landgate's development was at most conditional -- nothing in the record suggests that the Commission would have denied a development that fell within legally recognized, and environmentally more favorable, boundaries.

The nature of the Commission's actions comes into clearer focus if we alter the facts of this case slightly. Suppose the original owner of two lots that ran lengthwise in a north to south direction, east and west of each other, which we will designate as lots A and B, decided to reconfigure the lots into

two lots running lengthwise east to west, north and south of each other, lots C and D. The owner submitted development plans for lot C, but the Commission denied development because in its view such a lot did not legally exist, and because to recognize such a lot would have certain detrimental environmental consequences. This decision cannot be fairly characterized as a deprivation of all value of lot C, but simply as a refusal to reconfigure lots A and B. Even if it turned out that the Commission had incorrectly asserted its jurisdiction, it would have committed the state law error of improperly refusing to reconfigure lots A and B, not the constitutional one of denying development on lot C. Or to put it another way, the Commission's denial of development on lot C is not a final decision on that development until the dispute over whether lot C legally existed was resolved. Just as the denial of a permit for failing to properly submit to the CEQA process would not be a taking, even if the government's application of CEQA regulations prove to be flawed (see Pub. Resources Code, § 21168.9 [writ of mandate the sole remedy for violations public agency noncompliance with CEQA]), so the denial of development due to a determination, subsequently held to be erroneous, that the development did not conform to the property's legal boundary is not a taking.

The present case differs from the above hypothetical in that "lot C" was sold to a subsequent purchaser rather than kept by the original owner. But it cannot be the case that this subsequent purchase had a constitutional significance, converting the Commission's assertion of its regulatory jurisdiction to approve lot reconfigurations into a taking of property.[9]

9/ We note that the innocent purchaser of an illegal lot is not left without a remedy. There may well be private remedies available. (See, (continued...)

The present case also differs from the hypothetical because a road was built through lots A and B, thereby supporting Landgate's argument that even if the Commission had jurisdiction over a lot line adjustment, it had implicitly waived its right to deny that adjustment by acquiescing to construction of the road. But the existence of the road, while it may have been grounds for finding that the Commission erred in failing to recognize the legal existence of "lot C," did not convert the Commission's state law error into a taking. Again, the Commission could legitimately require that a lot on which development was requested be legal, when, as here, there are legitimate reasons for so requiring. Therefore, when the Commission determined that Landgate's lot was not legal, it could legitimately litigate the lot line question without offending the takings clause. The Commission could not be said to have reached a final and authoritative determination of the development on Landgate's lot until after the dispute about the legality of the lot had been resolved.

Of course, as explained in the preceding part of this opinion, a government agency may not evade the takings clause by fabricating a dispute over the legality of a lot, or by otherwise arbitrarily imposing conditions on development in order to delay or discourage that development. The

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9/ (...continued)
e.g., *Goodspeed v. Associated Almond Growers* (1929) 208 Cal. 121, 122 [sale of a parcel in violation of the Subdivision Map Act may be rescinded].) The innocent purchaser of an illegal lot may also have the options of negotiating with other private landowners to obtain a legal lot, and negotiating with the government agency to develop the property in such a way as to meet the agency's underlying concerns. Because Landgate's lot was ultimately judged to be legal, we do not know, and need not determine, which of these options Landgate could have pursued.

government agency's assertion of authority, whether or not erroneous, must advance some legitimate government purpose. But as discussed above, the Commission's actions in this case met this constitutional prerequisite.

In light of the foregoing, the difference between this case and *First English* becomes clear. Here, there was a postponement of development pending resolution of a threshold issue of the development approval process -- whether the lot was legal -- and not a final decision denying development. In *First English*, on the other hand, the Supreme Court assumed that the ordinance in question categorically denied all property owners within its purview the right to develop their property. Development was assumed to be denied in *First English*, in other words, even though there was no dispute about a threshold issue in the development approval process, as there was in this case, that would be a legitimate basis for postponing approval of development. The postponement of Landgate's development therefore does not constitute a temporary taking of property as that doctrine was conceived in *First English*.

Landgate indeed appears to argue that any impasse in the regulatory process that must be resolved through a judicial proceeding is a temporary taking rather than a normal delay in development. But *First English* merely stands for the proposition that once a government action finally denies all economically viable use of property, the fact that the government later rescinds that action after a judicial proceedings does not relieve it of its duty to pay compensation. (*First English, supra*, 482 U.S. at p. 321.) Nothing in *First English*, however, is inconsistent with the recognition that a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process,

and the fact that a developer must resort to such a determination does not constitute a per se temporary taking.

In fact, a review of our case law reveals numerous instances in which developers have sought a writ of mandate against public agencies over questions regarding lot configuration, compliance with the Subdivision Map Act, compliance with CEQA, and over other threshold questions that must be resolved before it can be determined whether a development should be permitted to proceed. The resolution of these cases often turns on the construction and application of complex statutory schemes and results in significant delays in the development process. In some cases, the developer succeeded in overturning the public agency's decision on these threshold development questions. (See, e.g., *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725 [county misconstrues its authority to merge parcels of land under Gov. Code, § 66410 et seq.]; *Lakeview Meadows Ranch v. County of Santa Clara* (1994) 27 Cal.App.4th 593 [county wrongly denies certificate of compliance with Subdivision Map Act pursuant to Gov. Code, § 66499.35 for parcels created prior to 1893]; *Native Sun/Lyon Communities v. City of Escondido* (1993) 15 Cal.App.4th 892, 911 [city misapplies Gov. Code, § 66452.6 in failing to extend subdivision map due to development moratorium]; *San Dieguito Partnership v. City of San Diego* (1992) 7 Cal.App.4th 748 [city misapplies Gov. Code, § 66412 in requiring particular lot line adjustment to comply with Subdivision Map Act]; *Great Western Sav. & Loan Assn. v. City of Los Angeles* (1973) 31 Cal.App.3d 403 [city misconstrues Subdivision Map Act to permit discretion in approving final subdivision map when all the conditions of the tentative map have been met].) In other instances, the courts have upheld the government's position on these threshold development questions. (See, e.g., *Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977 [county had properly

applied Gov. Code, § 66499.20½ in determining underlying land patents had been eliminated by subsequent subdivision]; *Harroman Co. v. Town of Tiburon* (1991) 235 Cal.App.3d 388 [town's downzoning of plaintiff's property inconsistent with present general plan but consistent with new draft general plan affirmed pursuant to Gov. Code, § 65589.5]); *John Taft Corp. v. Advisory Agency* (1984) 161 Cal.App.3d 749 [county's determination that parcels recognized by a United States Government Survey Map in 1878 not exempted from Subdivision Map Act upheld]; *South Central Coast Regional Com. v. Charles A. Pratt Construction Co., supra*, 128 Cal.App.3d 830 [developer obtaining tentative subdivision map prior to enactment of Coastal Act not exempted from Act's requirements]; *Bel Mar Estates v. California Coastal Com.* (1981) 115 Cal.App.3d 936 [Commission correctly construed statutory authority to deny development]; *Skrogings v. Kovatch* (1976) 64 Cal.App.3d 54 [county properly exercises authority under Subdivision Map Act to deny further lot splits before installation of public sewer system].)

Landgate does not appear to contend that litigation over threshold development questions is a taking of property if the government agency prevails in such litigation. But to conclude that such litigation is a normal part of the regulatory process when the public agency prevails but a per se temporary taking when the public agency loses has no basis in either logic or Supreme Court precedent.

In sum, Landgate has not demonstrated that the development delay between February 1991 and February 1993 was due to anything other than a bona fide dispute over the legality of Landgate's lot and the Commission's jurisdictional authority over the lot line adjustment. Such delay is an incident of property ownership and not a taking of property. (See *Agins v. Tiburon, supra*, 447 U.S. at p. 263, fn. 9.)

Although Landgate was in the unfortunate position of suffering from a delay not of its own making, the same can be said of any governmental mistake or, for that matter, any of a number of possible bottlenecks in the development process. (See, e.g., *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112 [development postponed several years due to association's litigation regarding the adequacy of the environmental impact report]); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553 [same]; *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446 [same].) Because nothing in the record demonstrates that the Commission's actions amounted to a regulatory taking of Landgate's property, the trial court should have granted its motion for summary judgment on Landgate's taking claim, and denied Landgate's motion for summary adjudication.

III.

For all the foregoing reasons, the judgment of the Court of Appeal is reversed and the cause is remanded to the Court of Appeal. The Court of Appeal shall remand to the trial court with directions to grant the Commission's motion for summary judgment against Landgate's takings claim and to deny Landgate's motion for summary adjudication.

MOSK, J.

WE CONCUR: GEORGE, C.J.
KENNARD, J.
WERDEGAR, J.

COPY

LANDGATE, INC. v. CALIFORNIA COASTAL COMMISSION

S059847

DISSENTING OPINION BY CHIN, J.

The takings clause of the federal Constitution guarantees property owners "just compensation" when their property is "taken for public use." (U.S. Const., 5th Amend.) In *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 322 (*First English*), the United States Supreme Court held that a property owner could recover compensation for a temporary taking.

First English involved a Los Angeles County ordinance that the plaintiff alleged prohibited all use of its property. (*First English*, *supra*, 482 U.S. at p. 308.) The plaintiff asserted that the ordinance constituted a taking of its property for public use, and it sought just compensation. (*Ibid.*) The trial court and California Court of Appeal ruled that plaintiff was not entitled to compensation unless the County opted to retain the ordinance following a judicial determination that the ordinance constituted a taking. (*Id.* at pp. 308-309.) In other words, these courts held that no taking could occur during the period of litigation over the validity of the ordinance. The United States Supreme Court disagreed, holding that, even if the County withdrew the ordinance as a result of the litigation, it still owed compensation for the temporary period the ordinance was in effect. (*Id.* at p. 322.)

Here, the California Coastal Commission (Commission) made clear that it opposed the lot line adjustment that created Landgate's lot, and therefore opposed all development of Landgate's property regardless of the magnitude of the development. The Commission's decision denying Landgate's application for a development permit had the same impact on Landgate as the ordinance in *First English* had on the plaintiff in that case. Landgate sued the Commission and successfully established that the Commission's decision was wrong under state law and also that it constituted a taking. The Commission then approved development of Landgate's property, thereby preventing Landgate from asserting a permanent taking. Under these circumstances, *First English* makes clear that the Commission must pay compensation for the *temporary* taking that occurred while its total ban on development of Landgate's property was in effect.

The majority notes that the high court did not decide in *First English* whether "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" would amount to a temporary taking. (*First English*, *supra*, 482 U.S. at p. 321.) The majority argues that this case involves a "normal delay" in the permit approval process, not a temporary taking. (Maj. opn., *ante*, at pp. 2, 31-32.) I disagree. When a regulatory agency prohibits all use of a particular property, and the property owner is forced to sue the agency to get it to change its position, its stonewalling is not fairly characterized as a "normal delay" in the permit approval process. Here, the Commission's denial of Landgate's development permit was not, as the majority argues, "conditional," merely calling for some reasonable act of compliance by Landgate. (Maj. opn., *ante*, at p. 28.) Rather, the Commission made clear that it would not approve any development on Landgate's lot regardless of the circumstances. Nor did the Commission in this case temporarily delay the

permit approval process "pending resolution of a threshold issue." (Maj. opn., *ante*, at p. 31.) Rather, the Commission flatly denied the permit, and its decision was final in every sense. The Commission was not planning to take any further action. Landgate had to sue the Commission to get relief.

In his dissent in *First English*, Justice Stevens articulated the precise argument on which the majority relies here. Specifically, Justice Stevens asserted, as does the majority here (maj. opn., *ante*, at pp. 31-32), that litigation over the validity of a land-use restriction is simply a "normal delay[]" in the permit approval process and therefore cannot give rise to a temporary taking. (*First English*, *supra*, 482 U.S. at p. 334 (dis. opn. of Stevens, J.).) Justice Stevens stated: "The Court's analysis . . . appears to erect an artificial distinction between 'normal delays' and the delays involved in obtaining a court declaration that the regulation constitutes a taking. [¶] *In my opinion, . . . [l]itigation challenging the validity of a land-use restriction gives rise to a delay that is just as 'normal' as an administrative procedure seeking a variance or an approval of a controversial plan.*" (*Id.* at pp. 334-335 (dis. opn. of Stevens, J.), italics added, fns. omitted.) Thus, Justice Stevens would have held that litigation over the validity of a land-use regulation, like other "normal delays" in the permit approval process, cannot give rise to a temporary taking even if the regulation deprives the property owner of all use of its property. The majority of the high court considered Justice Stevens's argument *and rejected it*. Now, the same argument has found new life in the majority opinion here.

I agree with the majority "that a government agency may deny a development permit when the reasonable conditions imposed on development are not met . . . ." (Maj. opn., *ante*, at p. 27.) I also agree that "a judicial determination of the validity of certain *preconditions to development* is a normal

part of the development process, and . . . does not constitute a per se temporary taking." (Maj. opn., *ante*, pp. 31-32, original italics.) Nevertheless, if the "preconditions to development" have the effect of prohibiting all use of the property regardless of the circumstances, then they constitute a taking. If those preconditions are permanent, then the taking is permanent; if those preconditions are temporary, then the taking is temporary. The majority cites numerous cases (maj. opn., *ante*, at pp. 32-33) in which litigation delay was "a normal part of the regulatory process." (Maj. opn., *ante*, at p. 33.) I find these cases irrelevant to the issue before us. First, these cases do not address whether the litigation delay constituted a temporary taking. Second, I do not argue that, in this case, the litigation delay by itself gave rise to the temporary taking; rather, I argue that the Commission's total and final ban on all use of Landgate's property (which existed during the litigation delay) gave rise to the temporary taking. As long as that total ban was in effect, the temporary taking continued.

In *First English*, the court held that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (*First English, supra*, 482 U.S. at p. 321.) The majority would limit this holding to cases involving "the passage and enforcement of a *law or regulation* that deprives property of all value." (Maj. opn., *ante*, at p. 17, italics added.) I find no basis in *First English* for this limitation. Here, the policies reflected in the Commission's adjudicative decision, like the ordinance at issue in *First English*, "worked a taking of all use of property," and

nothing "can relieve [the Commission] of the duty to provide compensation for the period during which the taking was effective." (*First English, supra*, 482 U.S. at p. 321.)

Accordingly, I dissent.

CHIN, J.

I CONCUR:

BAXTER, J.

COPY

LANDGATE, INC. v. CALIFORNIA COASTAL COMMISSION

S059847

DISSENTING OPINION BY BROWN, J.

The more things change, the more they remain the same. That is certainly true with respect to this court's takings jurisprudence. Almost 20 years ago, Justice Brennan, dissenting in *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. 621, 636, charged this court with sacrificing the right to just compensation guaranteed by the Fifth Amendment on an altar "of policy judgments made by the . . . judicial branch[]." (*Id.* at p. 661, fn. omitted.) Although the deference commanded by the high court's precedents is not always "absolute," when it has made an attempt to resolve definitively a difficult point of constitutional law that is applicable to the very issue before us, we ought either to respect its judgment or provide a reasoned basis for refusing to do so. To do otherwise, in Charles Fried's words, is "judicial impudence." (Fried, *Impudence* (1992) Sup.Ct.Rev. 155, 157, 192-193.)

I dissent.

Viewing pure democracy as incompatible with personal security or the rights of property (Madison, The Federalist No.

10 (Rossiter ed. 1961) p. 81),[1] the drafters of our Constitution went to extraordinary lengths "to control the governed" and to "oblige [the government] to control itself." (Madison, The Federalist No. 51, *supra*, at p. 322.) By adopting the Constitution, the people of the United States "manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed." (*Fletcher v. Peck* (1810) 10 U.S. (6 Cranch) 87, 138.)

The prohibition of the takings clause is one expression of the constitutional commitment to limiting government and maximizing individual liberty. The protection of private property guaranteed by the Fifth Amendment presupposes the property is sought for legitimate purposes, out of a desire to improve the public condition. It nevertheless prohibits appropriation of property -- even for such beneficial purposes -- without just compensation. The difficulty inherent in trying to reconcile popular self-government with private ownership of property has propelled the Supreme Court's takings doctrine along an erratic course, from protection of property rights as a matter of fixed principle to ad hoc balancing tests and back to categorical rules. The result has been justifiably criticized as muddled.

"[R]ecent cases," according to one scholar, "have done little to clarify the [Takings] Clause, and the doctrine remains in perplexing disarray." (McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings* (1998) 92

1/ Had the Federalists lost the argument, our Republic might more closely resemble P.J. O'Rourke's wry description. "The whole idea of our government is this: If enough people get together and act in concert, they can take something and not pay for it." (O'Rourke, Parliament of Whores (1991) p. 232.)

Nw. U.L. Rev. 591, 592, fn. 2 [citing treatises and law review articles over the past 15 years]; Schroeder, *Never Jam To day: On the Impossibility of Takings Jurisprudence* (1996) 84 Geo. L.J. 1531.) Despite the general impossibility of its takings jurisprudence, in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003 (*Lucas*), the United States Supreme Court made a heroic effort to bring a measure of clarity to an analytical framework that has grown doctrinally more difficult as it has become politically more fundamental. After embracing an intractably complex, ad hoc "balancing test" in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124 (*Penn Central*), the court in *Lucas* enunciated the clear rule which should govern our decision in this case:

"In 70-odd years of succeeding 'regulatory takings' jurisprudence [i.e., following *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393], we have generally eschewed any ' "set formula " ' for determining how far is too far, preferring to 'engag[e] in . . . ad hoc, factual inquiries.' [Citations.] We have, however, described at least *two discrete categories* of regulatory action as compensable *without case-specific inquiry* into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property . . . . [¶] The second situation in which we have found *categorical* treatment appropriate is where regulation *denies all economically beneficial or productive use* of land. [Citations.]" (*Lucas, supra*, 505 U.S. at p. 1015, italics added.)

If *Lucas* means what it says, it establishes a categorical rule. No amount of judicial legerdemain can transform its objective, bright-line standard into a license for courts to engage in prohibited forms of "case-specific inquiry into the public interests advanced in support of" (*Lucas, supra*, 505 U.S. at p. 1015) a given restraint.

After paying grudging lip service to *Lucas*'s categorical rule, the majority falls back on *Penn Central*'s squishy, "multi-factor" test, a standard so amorphous it is capable of producing virtually any result. This is the very test *Lucas* overruled pro tanto in cases, like this one, where the restraint at issue denies *all* economic use. The torturous logic by which today's majority decides an order of the coastal commission -- one that finally and unqualifiedly denied the landowners here *all* use of their property for over *two years* -- was a mere "temporary delay" is worth examining in detail.

First, the majority resuscitates the *Penn Central* test in this case by ignoring another equally clear precedent. In *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304 (*First Lutheran*), the United States Supreme Court concluded that temporary takings are compensable, repudiating this court's contrary holding in *Agins v. City of Tiburon* (1979) 24 Cal.3d 266. The majority dismisses the holding in *First Lutheran* as "narrow[]"; confined to its facts; requiring the existence of a final administrative decision before the presence of a constitutional violation can be determined; a case which did not hold that the "mere" assertion of regulatory jurisdiction constituted a taking; and so on. (Maj. opn., *ante*, at pp. 13-14.) But even if we accept all of the majority's quibbles, both *Lucas* and *First Lutheran* indisputably apply here.

Mystifyingly, the majority then instructs us that "[v]irtually every court that has examined the issue has concluded . . . that a regulatory mistake resulting in delay does *not*, by itself, amount to a taking of property." (Maj. opn., *ante*, at p. 14.) True enough. But none of the 10 cases cited in support of this patently obvious conclusion refutes the plaintiff property owners' claim for just compensation in this case.

Two of these "noncompensable delay" cases preceded *Lucas*; in the remainder, the court found either that the agency had *not* reached a final decision or that the regulation did not deny the owner *all* beneficial use. (See *Littoral Development Co. v. San Francisco Bay Conservation etc. Com.* (1995) 33 Cal.App.4th 211, 221-222 [no final decision]; *Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1065 [no final decision]; *Jacobi v. City of Miami Beach* (Fla.Dist.Ct.App. 1996) 678 So.2d 1365, 1366 [no denial of all economic use]; *Cannone v. Noey* (Alaska 1994) 867 P.2d 797, 801 [same]; *Dumont v. Town of Wolfeboro* (N.H. 1993) 622 A.2d 1238, 1244 [same]; *Tabb Lakes, Ltd. v. U.S.* (Fed. Cir. 1993) 10 F.3d 796, 798 [no final decision]; *Steinbergh v. City of Cambridge* (Mass. 1992) 604 N.E.2d 1269, 1274 [no denial of all economic use]; *Smith v. Town of Wolfeboro* (N.H. 1992) 615 A.2d 1252, 1257-1258 [same]; *1902 Atlantic Ltd. v. United States* (1992) 26 Ct.Cl. 573 [pre-*Lucas* decision applying *Penn Central* analysis]; *Lujan Home Builders v. Orangetown* (1991) 568 N.Y.2d 850, 851 [due process rather than takings analysis].)

Lucas itself teaches that its categorical rules do not apply unless the restraint at issue deprives the property owner of all economic use. (*Lucas, supra*, 505 U.S. at pp. 1015-1019.) Other takings cases make clear the high court's "insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." (*MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 351 (*MacDonald*); see also *Williamson County Regional Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 186 (*Williamson County*) ["Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property, nor utilized the procedures Tennessee provides for obtaining just compensa-

tion, respondent's claim is not ripe."].) As the court has stated, however, the role served by the ripeness requirement in the takings context is "prudential": to make clear "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. [Citations.] Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." (*Williamson County, supra*, 473 U.S. at p. 191; see *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981) 452 U.S. 264 (*Hodel*).)

Only recently, the court underlined the limited contours of "ripeness" in the takings context. In *Suitum v. Tahoe Regional Planning Agency* (1997) _____ U.S. _____ [117 S.Ct. 1659], it said that cases such as *Williamson County*, *MacDonald*, and *Hodel* "addressed the virtual impossibility of determining what development will be permitted on a particular lot of land when its use is subject to the decision of a regulatory body *invested with great discretion, which it has not yet even been asked to exercise*. No such question is presented here." (*Id.* at p. ____ [117 S.Ct. 1667], italics added; see also *Lucas, supra*, 505 U.S. at pp. 1011-1012.) It is that administrative flexibility that lies behind and justifies the prudential ripeness rule in the takings context. Those concerns simply have no bearing in this case, however, where the commission made clear the extent to which it would permit plaintiffs to develop their lot: Not at all. The cases relied on by the majority are thus wide of the only issue presented. Did the commission's definitive refusal to permit plaintiffs to make *any* use of their property -- a refusal that continued until, after two years of litigation, plaintiffs obtained judicial relief -- "den[y] all economically beneficial or productive use of [their] land." (*Lucas, supra*, 505 U.S. at p. 1015.)

This is not a case in which the property owners contend, as the majority would have it, that "a regulatory mistake resulting in delay . . ., by itself, amount[s] to a taking of property." (Cf. maj. opn., *ante*, at p. 14.) That is not, and never has been, the law of takings. Rather, plaintiffs' argument -- and the essential meaning of both *Lucas* and *First Lutheran* -- is that a *final* decision by a regulatory agency that denies *all* economically beneficial use of the property, even temporarily, is a per se compensable Fifth Amendment taking.[2] If that is so, then plaintiffs' property has been "taken," however temporarily, by the commission's order, and the payment of "just" compensation is constitutionally compelled. As both the trial court and the Court of Appeal concluded, that is what happened here.

The majority dodges the otherwise inevitable result by changing the question: "The present case poses the issue of whether a legally erroneous decision of a government agency during the development approval process resulting in delay constitutes a temporary taking of property." (Maj. opn., *ante*, at p. 14.) "Legally erroneous"? "Process"? "Delay"? Of course mere "delay" in a "process" resulting from an "erroneous decision" does not qualify as a constitutional violation. If it did, every "mistake" by government land use

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2/ As *Lucas* itself and following cases have pointed out, there is one recognized exception even to the court's categorical takings rule. If the government can demonstrate that controlling principles of "background law" -- typically embodied in a state's nuisance law -- do not permit the use at issue, compensation is not required. (See 505 U.S. at p. 1029 ["A law or decree with such an effect [i.e., prohibiting all economically beneficial use] must . . . do no more than duplicate the result that could have been achieved in the courts -- by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally. . . ." (Fn. omitted.)].)

authorities leading to any delay in the owner's use of her property would require compensation. A massive raid on the public fisc would ensue. Suppose, however, the question were differently, more evenhandedly, framed as one that "poses the issue of whether a regulatory decision barring any use of property until the agency's decision is overturned by a court constitutes a temporary taking of property?" What result then? That, rather than the majority's tendentious formulation, is the issue presented by this case.

In any event, the majority's trick question has already been asked and answered. As Justice Chin points out in his dissent (see dis. opn. of Chin, J., *ante*, at pp. 2-3), the identical position espoused by the majority -- that litigation over the validity of a land use restriction is simply a "normal delay" in the permit approval process and thus cannot give rise to a temporary taking -- was advanced by Justice Stevens in his *dissenting opinion* in *First Lutheran*. (See 482 U.S. at pp. 334-335.) The precise issue has thus already been considered and rejected by the high court. (See dis. opn. of Chin, J., *ante*, at p. 3.)

If *Lucas* lays down a categorical rule; and if, as *First Lutheran* concludes, a final order that *temporarily* deprives a property owner of *all* economically beneficial use is a compensable taking, these propositions ought to readily yield a clear answer, one that does not depend on the majority's elaborate, even arduous, preliminary discussion. (Cf. *Florida Rock Industries, Inc. v. U.S.* (Fed. Cir. 1994) 18 F.3d 1560, 1564-1565 [*Lucas* "teaches that the economic impact factor alone may be determinative; in some circumstances, no balancing of factors is required. If a regulation categorically prohibits *all* economically beneficial use of land -- destroying its economic value for private ownership -- the regulation has an effect equivalent to a permanent physical occupation. There

is, *without more*, a compensable taking." (Fns. omitted, second italics added.)].)

What the Supreme Court's categorical rule in *Lucas* means for property owners, and what the majority refuses to acknowledge, is that after *Lucas*, Justice Holmes's famous apothegm in the *Rock Island Railroad* case, that "Men must turn square corners when they deal with the Government" (*Rock Island & c. R. R. v. United States* (1920) 254 U.S. 141, 143) is now reciprocal. Following *Lucas*, in a limited class of cases, regulators whose *final* action denies an owner *all* beneficial economic *use* of land are on notice that, if their decisions prove wrong when tested in court, the government may face a damages judgment for a temporary taking even if the restraint is later rescinded. In this context at least, it is *government* that must turn square corners when it attempts to overregulate the use of private property or is in danger of "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49; *Lucas, supra*, 505 U.S. at p. 1018.)

To further confuse the discussion, the majority plunges into a lengthy disquisition on the connection between the land use regulation at issue here and the legitimate governmental purposes it arguably advances. This, of course, is the formulation developed in *Dolan v. City of Tigard* (1994) 512 U.S. 374, and *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, a "nexus" test that is precluded by the categorical rule in *Lucas*. Indeed, the very nature of *Lucas*'s categorical rule appears to bar a court from conducting a case-specific inquiry into those interests that might justify the restraint imposed on the plaintiffs' use of their property by the commission's order. (*Lucas, supra*, 505 U.S. at p. 1015 ["We have ... described ... two discrete categories of regulatory

action as compensable without case-specific inquiry into the public interest advanced in support of the restraint."].)

Although Justice Holmes's caution that when regulation "goes too far it will be recognized as a taking" is foundational to much takings jurisprudence (*Penna. Coal Co. v. Mahon, supra*, 260 U.S. at p. 415), the high court "ha[s] never set forth the justification for this rule." (*Lucas, supra*, 505 U.S. at p. 1017.) As Justice Scalia explains: "Perhaps it is simply ... that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. [Citation.] . . . Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' [citation] in a manner that secures an 'average reciprocity of advantage' to everyone concerned [citation]. And the *functional* basis for permitting the government ... to affect property values without compensation ... does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses." (505 U.S. at pp. 1017-1018, italics in original.)

"On the other side of the balance," the *Lucas* majority continued, "affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. [Citations.] As Justice Brennan explained: 'From the government's point of view, the benefits flowing to the public from preservation of open space through regulations may be

equally great as from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property.' " (505 U.S. at p. 1018.) In short, Justice Scalia concluded, "there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial use in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." (505 U.S. at p. 1019, fn. omitted, italics in original.)

It is evident the majority is unwilling to come to terms with the true meaning and operative effect of *Lucas* and *First Lutheran*. At every turn, its opinion reflects the abiding conviction that takings jurisprudence has not advanced a single step beyond the "regulatory friendly" analysis of *Penn Central*. At every opportunity, the majority reverts to *Penn Central's* ad hoc factual inquiry. Limning all this reasoning is the vocabulary of "balance." Instead of confronting the meaning of *Lucas* as it applies in this case, the majority chatters endlessly of "delay ... owing to the mistaken assertion of jurisdiction" (maj. opn., *ante*, at pp. 1-2), " 'normal delay' " (*id.* at p. 2), "normal delay rather than a temporary taking" (*ibid.*), "legally erroneous decision ... during the development ... process resulting in delay" (*id.* at p. 14), "reasonable regulatory process designed to advance legitimate government interests" (*id.* at p. 18), "[m]ere fluctuations in value during the process of government decisionmaking" (*ibid.*), "mistaken assertion of jurisdiction" (*ibid.*), "normal development delay" (*id.* at p. 25), "conditional denial" (*id.* at p. 28), "condition . . . erroneously imposed" (*ibid.*), "plausible . . . though perhaps legally erroneous" (*ibid.*), "postponement of development" (*id.* at p. 31), "bona fide dispute" (*id.* at p. 33), "delay [as] an incident of property ownership" (*ibid.*), and plaintiffs' "unfortunate position of suffering from a delay." (*Id.* at p. 34.) Thus is reality ruthlessly revised. (Cf. *Nollan v. California Coastal*

Comm'n, supra, 483 U.S. at p. 831 ["To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather. . . 'a mere restriction on its use,' . . . is to use words in a manner that deprives them of all their ordinary meaning."].)

The majority's discussion concludes with a proposition that is flatly incompatible with *Lucas*: "[W]e must determine not whether a sinister purpose lurked behind the [c]ommission's decision, but rather whether the development restrictions imposed . . . *substantially advanced some legitimate state purposes so as to justify the denial of the development permit.*" (Maj. opn., *ante*, at p. 20, italics added.) Had *Lucas* never been decided; had the commission not denied plaintiffs *all* use of their property; had *Penn Central*'s ad hoc test the slightest relevance to this case, the majority's conclusion might have *some* bearing here. But none of these things is true.

The remainder of the majority opinion continues to joust with its own strawman. Yet, to repeat: The test is not "whether the development restrictions imposed on the subject property substantially advanced some legitimate state purposes." (Maj. opn., *ante*, at p. 20.) That formula, lifted from *Penn Central*, simply is no longer relevant under the circumstances here; indeed, the inquiry is barred by Lucas. And the majority's conclusion -- that though the commission may have been "mistaken given the peculiar facts of this case, its position was not so objectively unreasonable as to give rise to the inference that it was adopting that position solely for purposes of delay or some other illegitimate reason" (maj. opn., *ante*, at p. 24) -- is obstinately beside the point.

The majority persistently misstates and mischaracterizes both the issue before us and governing takings law. In the end,

however, the majority is finally forced to concede the meaning of *First Lutheran*: "[*It*]. . . stands for the proposition that once a government action finally denies all economically viable use of property, the fact that the government later rescinds that action after a judicial proceeding does not relieve it of its duty to pay compensation." (Maj. opn., *ante*, at p. 31, italics added.)

Yes, exactly; and *that* is *this* case. As plaintiffs point out, were that not the law, the holding of *Lucas* would be emasculated. If *any* "threshold," "jurisdictional" assertion by a government land use agency that has the effect of barring all economically beneficial use of property can be converted into "the recognition that a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process" (maj. opn., *ante*, at p. 32, italics in original), then, in California, at least for now, *Lucas* is a dead letter.

CONCLUSION

When the answer to every question about what the public needs or wants or should have is always "more," the demand for free public goods is infinite. Against this relentless siphon, the takings clause, and the courts' ardent defense of it, stands as a last lonely bulwark of property rights. It is, and will continue to be a difficult rampart to maintain. That difficulty is built right into our constitutional structure. But, in one area at least we have arrived at a clear understanding: when the government denies all economically viable use of property, even temporarily, it may not achieve its ends "by a shorter cut than the constitutional way of paying for the change." (*Penna.*

Coal Co. v. Mahon, supra, 260 U.S. at p. 416.) In these limited circumstances, government must turn square comers -- except in California.

BROWN, J.

I CONCUR:

BAXTER, J.

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APPENDIX B

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

COURT OF APPEAL -
SECOND DISTRICT
FILED Feb-7 1997
JOSEPH A. LANE, Clerk
SHIRLEY BEAUX, Deputy Clerk

LANDGATE, INC., et al.,	)	
	)	
Plaintiffs and	)	
Appellants,	)	B084315
	)	
v.	)	(Super. Ct. No. BC 024391)
	)	
CALIFORNIA COASTAL	)	
COMMISSION,	)	
	)	
Defendant	)	
and Appellant.	)	
	)	

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II and IV.

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard C. Hubbell, Judge. Reversed in part, affirmed in part and remanded.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Jan S. Stevens, Assistant Attorney General, Peter Kaufman and Joseph Barbieri, Deputy Attorneys General, for Defendant and Appellant.

Reznik & Reznik, Fred N. Gaines and Kevin M. Kemper for Plaintiffs and Appellants.

In October 1990, Landgate, Inc. applied to the California Coastal Commission for a coastal development permit to build a house and related structures on its lot in the Malibu hills. The Commission asserted that the lot--approved by the County of Los Angeles when owned by Landgate's predecessor in interest--was unlawful because it lacked Commission approval. The Commission denied Landgate's coastal permit application. Landgate successfully petitioned the trial court for a writ of mandate challenging the permit denial and successfully defended on appeal the trial court's grant of the writ. Landgate then returned to the trial court to resolve the remaining "taking" claims.

The Commission appeals from the judgment awarding compensation for inverse condemnation, prejudgment interest, and attorney fees and costs. The Commission claims the trial court erred in granting Landgate's motion for summary adjudication on its third cause of action, which alleged that the Commission had, by its February 1991 permit denial, deprived Landgate of all economically viable use of its land and thus temporarily "taken" that land without paying the constitutionally required "just compensation." The Commission also argues the trial court erred in awarding Landgate $155,657 in temporary taking damages following trial on the subject of damages.

Landgate cross-appeals, claiming (1) it was entitled to Code of Civil Procedure section 1036 expenses incurred in the writ of mandate proceeding,(2) the court should have adopted the fair rental value method of assessing damages, and (3) the court erred in dismissing Landgate's 42 United States Code section 1983 cause of action and refusing to allow Landgate to identify Commission members and Commission staff personnel individually as Doe defendants in that claim.

In the published portion of this opinion, we affirm the trial court's ruling that the Commission's denial of the permit temporarily deprived Landgate of all economically viable use of its lot and thus constituted a categorical taking under the Fifth Amendment to the United States Constitution and article I, section 19 of the California Constitution. We also reverse and remand with respect to the trial court's denial of Landgate's request for Code of Civil Procedure section 1036 expenses incurred for the writ of mandate proceeding.

In the unpublished portion of the opinion, we reverse that portion of the damages award attributable to property taxes for the relevant period, affirm the balance of the award, and affirm the dismissal of Landgate's 42 United States Code section 1983 cause of action and the grant of the Commission's motion to quash service of summons on individual Commissioners and staff members.

FACTS

Before 1973, a large unimproved tract in the Malibu hills was approved for subdivision into approximately two-acre lots, each zoned for a single-family home. After the subdivision, Landgate's predecessor in interest owned two parcels which ran north and south. The northern portions were sloped, the southern portions were flat. One of the lots contained a single family home on its flat southern portion. Both lots lie within the coastal zone in the County of Los Angeles.

In the mid 1980's, the County planned to improve an east-west road through the two lots. The proposed road would divide the two lots into one northern lot and one southern lot. The landowner and the County agreed that, in exchange for the owner's dedicating portions of the parcels for the roadway

easement, the County would reconfigure the lots into a single, sloped lot north of the road and a single, flat lot south of the road, each still zoned for a single family home.

The County completed the road improvement and formally approved the lot reconfiguration, which was recorded July 5, 1989. At that point, the Commission had approved the County's Malibu land use plan, but at all relevant times had not certified a County Malibu local coastal program. The lots' owner did not seek or receive Commission approval of the lot line adjustment. The Commission did not challenge the County's approval of the reconfiguration.

In October 1990, Landgate bought the sloped northern 2.45 acre lot and applied for and received County approval in concept of grading and building plans for a single-family home to be built on the property.[1] Landgate applied to the Commission for a permit to build the house and related structures and the Commission scheduled the matter for its December meeting in San Diego.

Landgate's October 12, 1990, permit application sought approval of the house and related structures. The plans called for a 9,036 square foot home, a guest house and swimming pool and 8,500 cubic yards of grading. In a November 1 letter, Commission staff requested additional materials in connection with the application. In late November, Landgate's representative first learned from staff that the lot line adjustment was going to be an issue in connection with the

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1/ Landgate's first amended petition/complaint, filed November 19, 1993, added Peter and Punte Bogart, who "owned and controlled" Landgate as plaintiffs. The Bogarts held a life estate in the subject lot. We refer to the Bogarts and Landgate collectively as "Landgate."

application. Before the original staff report was prepared, Landgate modified its proposal by reducing the house to 7,500 square feet, eliminating the guest house and changing other structures, and reducing proposed grading to 4,300 cubic yards.

According to the November 1990 staff report, development along the road or "overview" for which the Landgate house was proposed was "limited to two existing single family residences." Although there was "no existing or planned-for development along the inland or northern side of the overview[,] ... there [was] a three-lot subdivision ... which was approved with conditions at the December, 1990... Commission hearings. This subdivision is just north and west of the overview."

At its December 13 meeting in San Diego, the Commission first considered the now-reduced project, which, according to the staff report, proposed to build on an illegal lot and violated visual resources (views from a trail in a tributary of Escondido Canyon below the south side of the road) and landform alteration (grading) requirements. The Commission voted to continue the matter due to questions concerning the legality of the lot under the California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq.) because the Commission had not approved the County's lot line adjustment.

According to the declaration of its engineer/representative in support of Landgate's motion ("Petrovsky Declaration"), "once the lot line adjustment issue was raised ... the [Commission] staff would not negotiate with regard to the issues of the size of home, grading, etc. Instead, the legality of the lot became the focus of their attention." Landgate then reapplied for a coastal development permit, adding a request for Commission approval of the County lot line adjustment.

At its February 7, 1991, meeting, the Commission denied Landgate's application, finding, among other things and over Landgate's objection, that the lot itself constituted an impermissible "development" under the Coastal Act because it was created without Commission approval, and that the proposed house and related structures would produce excessive soil, grading, and visual degradation.[2]

At the hearing, the District Director, who presented staff's recommendations, told the Commission, "The lot line adjustment changed the configuration of the two lots so that instead of being long, narrow lots, you now have two lots with the lot line being located at the center line of [the road]. [¶] What this does is it results in two lots, one of which is on the down slope side of [the road] and is much steeper than the area located on the up slope side of [the road]. [¶] Staff would suggest that this lot line adjustment not be approved, that it would be preferable to concentrate the development on the two lots on the up slope side of [the road] where the property is more level."

After Petrovsky, Mr. Bogart, and others spoke, one Commissioner asked the District Director whether he was "right ... to say that if the lot line adjustment came before us, you would have recommended denial?" The District Director

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2/ " 'Development' means ... the placement or erection of any solid material or structure; discharge or disposal or any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision . . . and any other division of land, including lot splits, . . . ; construction, reconstruction, demolition, or alteration of the size of any structure...." (Pub. Resources Code, § 30106.)

replied, "That is correct." Shortly thereafter, the Commission denied the application.

Immediately after the vote, another Commissioner said that the issue of "the County's refusal to recognize our right to review lot line adjustments" was "an issue that ha[d] come before [the Commission] many, many times in the Malibu area." She added it was "really time to become extremely serious about this" and asked that staff counsel be directed to communicate with the County on the topic. The Commission's Chief Counsel said he would draft the letter for the Chairman's signature.

On April 11, 1991, the Commission denied Landgate's reconsideration request, which included a newly modified proposal reducing the height to 32 feet above natural grade and reducing grading to approximately 500 cubic yards. After Landgate's representative described the revised project, staff advised the Commission that Landgate was not requesting reconsideration in terms required by statute, but was describing a new project, for which it was free to apply.[3]

The District Director told the Commission, "One of the problems I think is that staff has indicated that in your denial of this project part of the basis for your denial was the lot line adjustment and that we told them even if they make these modifications we'll still recommend denial." Chief Counsel told

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3/ Public Resources Code section 30627, subdivision (b)(3) provides: "The basis of the request for reconsideration shall be either that there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter or that an error of fact or law has occurred which has the potential of altering the initial decision."

the members, "[W]ithout the lot line adjustment some of these revisions are I think irrelevant." Counsel also told the Commission, "This project does not work, if you please, without that lot line adjustment."

The Commission's Executive Director advised the members that "even with this new information [that Landgate was proposing], had it been presented at [or before the February 1991 meeting], . . ., without your willingness to change the lot line, [the] information wouldn't have led to a different result." The Commission followed staff's recommendation to deny the reconsideration.

Landgate sued and, among other relief, petitioned for issuance of a writ of mandate directed to the Commission. On October 24, 1991, the trial court issued the writ, vacating the Commission's denial of the project and ordering it to reconsider the application assuming the lot reconfiguration valid. The Commission scheduled the matter for its November 14, 1991, San Diego meeting. Landgate prepared for and traveled to the meeting, but the Commission continued the matter until its December meeting without conducting a hearing.

On November 21, 1991, the Commission filed a return stating the parties were exploring settlement involving approval of a smaller project on Landgate's lot. According to the return, the parties were exploring a resolution of the litigation, including Landgate's presentation of a downsized project in exchange for Landgate's agreement to drop its remaining causes of action and withdraw certain portions of its claim for costs and attorney fees. Instead, the Commission appealed the grant of the writ. We affirmed the order issuing the writ of mandate, holding that under the facts of this case, the lot line adjustment was not a new "development" within the

meaning of the Coastal Act. We held that the Commission had no jurisdiction to deny the permit on that ground.

On February 16, 1993, the Commission approved Landgate's application for a 7,500 square foot, 35 foot high, single-family residence, with a swimming pool, garage, and septic system. Grading involved 2,983 cubic yards. The approval was subject to special conditions which included submission of revised plans for the Executive Director's approval. The plans were to show that the height of the house did "not exceed ... 28[] feet above existing grade or finished grade, whichever is more restrictive."

According to the relevant staff report, the proposed residence was 30 feet in height when nearest the road, 35 feet in height from existing grade in the section extending down the hillside, and would be 15 feet above existing grade for part of where it paralleled the road. In addition, according to staff, "the only development visible from the [Escondido Canyon Trail] ... is the roofline of the tower of an existing residence and a home under construction, both on the Overview ridgeline. However, at least one single-family residence has been approved on the Overview, as well as the Shriner three-lot subdivision to the west on [the same road as the Landgate property]. The Shriner subdivision includes lots above and below the road." Other statements in the report reflect other project approvals in the area overlooking the trail.

After issuance of our remittitur, Landgate sought summary adjudication on its third cause of action ("Taking of Property Without Just Compensation"). Landgate argued its claim was meritorious and without defense because (1) Landgate had been "deprived, at least temporarily, of all economically viable or productive use of its property" because, "at least temporarily, [it] could not legally obtain any valid permits or

approvals to construct any project on its property as a result of the Commission's actions." Landgate also argued (2) the Commission's actions did not "substantially advance any legitimate State interest," and (3) it had been "deprived, at least temporarily, of all reasonable investment-backed expectations with regard to its property" because it "at least temporarily, could not legally obtain any valid permits or approvals to construct any project on its property as a result of the Commission's actions." The trial court granted Landgate's motion, ruling that the Commission's actions had at least temporarily deprived Landgate of all economically viable use of its property. The court awarded Landgate $155,657 in damages. The Commission appeals.

DISCUSSION

Standard of Review

As relevant, Code of Civil Procedure section 437c provides that a party may move for summary adjudication as to a cause of action if that party contends there is no merit to an affirmative defense to that cause of action. The motion is to be granted only if it completely disposes of that affirmative defense. (Code Civ. Proc., § 437c, subd. (f)(1).) A plaintiff meets his burden of showing there is no defense to a cause of action if he has proved each element of his cause of action. If the plaintiff meets that burden, the burden shifts to the defendant to show that one or more triable issues of material facts exist as to the cause of action or the defense thereto. (Code Civ. Proc., § 437c, subd. (o)(1).)

" 'In reviewing an order granting, or denying, a motion seeking a summary adjudication of particular issues, we are governed by the rules applicable generally to a review of

summary judgments.' [Citation.] 'An appellate court determines de novo whether there is a genuine issue of material fact and the moving party was entitled to ... summary adjudication as a matter of law.' [Citation.]" (*Hansen Mechanical, Inc. v. Superior Court* (1995) 40 Cal.App.4th 722, 726-727.)

I

Temporary Taking

In its third cause of action, Landgate alleged that the Commission's permit denial constituted a taking of property under both the federal and state constitutions. The Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation." This prohibition was made applicable to the States by the Fourteenth Amendment. (See *Chicago, Burlington &c. R'D v. Chicago* (1897) 166 U.S. 226.) Article I, section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation ... has first been paid to, or into court for, the owner...."

Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, offers the best guidance for resolution of this temporary taking claim. In *Lucas*, the high court confronted South Carolina's 1988 Beachfront Management Act, "which had the direct effect of barring [Lucas] from erecting any permanent habitable structures on his two [beachfront] parcels." (*Id.* at p. 1007.) The issue was "whether the Act's dramatic effect on the

economic value of Lucas's lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of 'just compensation.' [Citation.]" (*Ibid.*)

Lucas had bought his two lots after the state enacted its original coastal zone management act in 1977, under which he was not required to obtain a permit in advance of any development. He intended to build two single-family homes, as owners of adjacent parcels had already done. Lucas commissioned architectural drawings. The 1988 Act ended his plans by prohibiting development of lands located, like his, within an area seaward of a coastal erosion baseline established pursuant to the statute.

Lucas filed suit. He did not challenge the state's authority under the police power to enact the ban. Instead, he claimed the Act's complete extinguishment of his property's value entitled him to compensation. The trial court agreed, finding, among other things, that when Lucas bought the lots both were zoned for his intended use and no restrictions were placed thereon by state or local law. The trial court also found that the Act decreed a permanent ban on construction on Lucas's lots, eliminated the unrestricted use, and rendered them valueless, thus concluding that the properties had been "taken" by operation of the Act. The court ordered the state to pay just compensation of $1,232,387.50.

The South Carolina Supreme Court reversed, troubled by Lucas's failure to challenge the validity of the Act itself. In the absence of such an attack, "the court believed itself bound to accept the 'uncontested ... findings' of the [state] legislature that new construction in the coastal zone--such as [Lucas] intended--threatened this public resource. [Citation.]" (*Lucas v. South Carolina Coastal Council, supra,* 505 U.S. at p.

1010.) The South Carolina court ruled that when a land use regulation is "designed 'to prevent serious public harm,' [citations], no compensation is owing under the Takings Clause regardless of the regulation's effect on the property's value."(*Ibid.*)

The United States Supreme Court rejected the state court's approach. The high court referred to its history in the area of uncompensated taking by overregulation and concluded, "In 70-odd years of . . . 'regulatory takings' jurisprudence [after the decision in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393], we have generally eschewed any '"set formula"' for determining how far is too far, preferring to 'engag[e] in ... essentially ad hoc, factual inquiries.' [Citations.] We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property.... [¶] The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. [Citations.] As we have said on numerous occasions, the Fifth Amendment is violated when land[]use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land*.' [Citation.]" (*Lucas v. South Carolina Coastal Council, supra,* 505 U.S. at pp. 1015-1016; fns. omitted.)

After this court affirmed that the Commission had no jurisdiction to deny the permit on the basis of the lot line adjustment, the Commission granted the conditioned permit described above. In ruling on Landgate's later motion for summary adjudication on the taking issue, the trial court found that the Commission's February 1991 denial of the permit

application "deprived [Landgate], at least temporarily, of all economically viable or productive use of its property insofar as Landgate ... could not legally obtain any valid permits or approvals to construct any project on its property as a result of the Commission's actions."

Petrovsky stated in his declaration that he had handled at least 15 Commission matters before Landgate's and was "very familiar with the procedures and requirements for construction in the Coastal Zone." He explained that normally the application for a project marked the beginning of negotiations concerning the size of a home, grading, and other construction-related factors. "Through a negotiated process, a resolution is typically reached with regard to the size of the home, amount of grading and other issues."

We agree that the Commission's permit denial caused a taking of Landgate's property. The Commission argues that its 1991 permit denial was not, in the language of *Lucas*, one of those "extraordinary circumstance[s]" in which government actions are found to deprive landowners of all economically viable use. (*Lucas v. South Carolina Coastal Council, supra*, 505 U.S. at p. 1017.) The Commission does not argue that a viable use of the land remained after the permit denial. Instead, the Commission contends the two-year hiatus was the result of its "mistake" concerning the lot line adjustment, which resulted in the kind of typical temporary delay which is noncompensable under the takings clause.[4] The

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4/ The Commission relies on a number of noncompensable delay cases which we find factually driven and distinguishable or not binding on this court. For example, in *Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, the landowner/developer raised a facial challenge to a voter-enacted growth control ordinance which permitted only

(continued...)

4/ (...continued)
staged development. The undisputed facts established that the property was eventually sold and used for the planned purpose.

In *Guinnane v. City and County of San Francisco* (1987) 197 Cal.App.3d 862, the landowner bought four, adjoining vacant lots in 1979. In July 1980, the city planning commission and recreation and parks commission designated an area which included the lots for study for possible acquisition as a park. The area was included in the recreation and open space element of the city's master plan. In September 1980, the landowner applied for a building permit to build four houses on his lots. The planning department required preparation of an environmental impact report. The Landowner hired a consultant to prepare the document. In October 1981, the park study was completed and the two city agencies recommended purchase of only a portion of the subject area. The area to be bought did not include the four lots. Two months later, the planning commission amended the master plan to permit construction on lots not to be acquired, and the following month rescinded its requirement of an EIR for the landowner's proposed project. In connection with preparation of the negative declaration the planning department decided would suffice as environmental review, the department asked the landowner for certain supporting information. It took the landowner more than three years to submit the information. In October 1985, the city issued an amended negative declaration in response to public comment. Meanwhile, the landowner had filed suit in 1982. The landowner sued before the environmental review was completed and the record did not show whether any final action had been taken on the new building permit the landowner had filed after his original application had been cancelled because of his failure to supply information. When the city's motion for summary judgment was heard in February 1986, the new application had not yet been acted on.

In *Tabb Lakes, Ltd. v. U.S.* (Fed. Cir. 1993) 10 F.3d 796, the landowner began filling wetlands without a permit and then sued for compensation for an alleged taking when the United States Army Corps
(continued...)

Commission points out that the regulatory process is complex (including disputes over sufficiency of the applicant's submitted information, geographical boundaries of an agency's jurisdiction and of a landowner's property, and, as in this case, an agency's authority to require a permit) and that "regulatory agencies ... sometimes make mistakes in resolving these issues."

We recognize, as Petrovsky suggested, that the regulatory process necessarily involves reasonable delay to the landowner. We realize, as well, that mistakes sometimes, but certainly not inevitably, occur as part of the review process. What we cannot accept is the Commission's characterization of the treatment of Landgate here as the reasonable result of a "mistake." Nothing in the record suggests that the lot line adjustment issue arose out of anything other than the Commission's ongoing jurisdictional spat with the County of Los Angeles combined with a desire to prevent Landgate from building on its parcel. Instead, the overwhelming sense of the record is that by its insistence that the lot itself was illegal, the Commission put Landgate in a situation which was not of

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4/ (...continued)
of Engineers issued a cease and desist order. The appellate court held, inter alia, that the delay caused by the cease and desist order was neither extraordinary nor in bad faith and, even if the landowner's ability to sell the property was affected by the order, the order only delayed development. (*Id.* at p. 800.)

In contrast, in this case, Landgate applied for a permit to build the house and was negotiating with Commission staff before the lot line adjustment issue arose. Landgate had bought a lot approved by the County. The Commission's action, taken in excess of its jurisdiction, left Landgate not only unable to use its land but unable even to negotiate for a different project.

Landgate's own making and which Landgate could do nothing to cure. In short, this was not a case of bureaucratic bungling, but a declaration of war between governmental behemoths in which the inevitable casualty was to be a noncombatant, Landgate. The Commission, with apparent indifference to the consequences on its applicant, denied the permit without the jurisdiction to do so. The direct effect was to prevent Landgate from, as the trial court put it, "construct[ing] any project on its property."[5]

The facts of this case speak for themselves. When it denied the coastal permit, the Commission went too far and denied Landgate all economically viable use of its property, preserving it as open space. As *Lucas* states, "[T]he fact that regulations that leave the owner of land without economically beneficial or productive options for its use--typically, as here, by requiring land to be left substantially in its natural state--carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm. [Citations.]" (*Lucas v. South Carolina Coastal Council, supra*, 505 U.S. at p. 1018.)

5/ It appears that Landgate tried to meet Commission staff's concerns about the County-approved reconfiguration by modifying its original application, so that at the February 1991 meeting, the project included a request for Commission review of the reconfiguration. We question whether, despite its apparent desire to comply with staff's wishes, Landgate was in a position to rightfully ask for that review. It did not own both of the original lots, and did not own any land south of the road. Thus, the effect of its "reapplication" and, indeed, certain aspects of the staff report for the February 1991 meeting gave an unreal quality to the process with staff's conclusion "that the least environmentally damaging site for development is on the coastal [south] side of [the road] and that the original lot configuration of long thin parcels extending across the road should not be altered."

As in *Lucas*, the trial court here found that the permit denial deprived Landgate of all economically viable use of its land. Our review of the record leads us to the same conclusion. Faced with the lot line adjustment issue to which it had not contributed and which had the effect of prematurely ending the normal negotiating process, Landgate was put in an unworkable position. When its permit to build a single family residence was denied because of that same issue, Landgate was left with no economically viable use of its land.

The Commission contends, in the alternative, that its assertion of permit jurisdiction did not constitute a taking because Landgate did not establish its right to a permit before the alleged taking. The Commission posits that its denial was based independently on the project's conflict with Coastal Act policies regarding grading and visual intrusion and, therefore, even had it not reached the lot line adjustment issue, the Commission's permit denial would have been proper. Thus, the Commission argues, Landgate did not establish its entitlement to a permit until after additional changes were made and Landgate accepted permit conditions imposed at the February 1993 meeting. As a result, the argument continues, the February 1991 denial did not constitute a taking.

As we already have noted, in his declaration in support of the summary adjudication motion, Petrovsky, experienced in matters involving the Commission's process, explained that typically the application for a project marked the beginning of ultimately successful negotiations concerning the size of a home, grading, and other construction-related factors. However, Commission staff ceased normal negotiations with the applicant after staff raised the lot line adjustment issue, an issue over which Landgate claimed the Commission lacked jurisdiction. Staff's position remained unchanged and was

conveyed to the Commission, which denied the permit pursuant to staff's recommendation.

The Petrovsky Declaration and statements of Commission staff, chief counsel, and Commissioners quoted in our factual summary above support our conclusion that the lot line adjustment was pivotal in the permit denial and in the denial's complete prohibition of any development on Landgate's lot. So long as the Commission held to its finding that the reconfiguration remained a subject for its review, Landgate could not negotiate to obtain the permit necessary to build a house on its County-approved lot. Not until two years after its original denial did the Commission approve a project for the Landgate property.

The Commission's ultimate approval of the house for the Landgate property, after the reconfiguration issue had been laid to rest, validates our conclusion that the lot line adjustment issue was the determinative basis for the denial. Despite the Commission's current protestations to the contrary, hindsight shows clearly that visual impact and grading issues were not pivotal in the 1991 permit denial if only because in 1993, shortly after the remittitur was final in the preceding appeal, the Commission approved a single family residence for the property. At that point, the project was described as a 7,500 square foot, 35-foot high, single family residence, with swimming pool, garage, and septic system and grading of 2,983 cubic yards. The only difference between these facts and the rejected 1991 project was a grading reduction of approximately 1,300 cubic yards, apparently proposed by Landgate.[6]

6/ According to the relevant staff report, project plan changes were: "reduction in grading from 4300 [cubic yards] to 2983 [cubic yards], (continued...)

It is true, as the Commission points out, that its ultimate approval of the project was conditioned and that the conditions included a height limitation, which appears to have resulted in some reduction in height. However, as Landgate points out, the Commission could have imposed special conditions on matters such as height in February 1991, had it not been so intent on reviewing the County's lot line adjustment.

Additional substantiation that the lot line adjustment was the basis for the permit denial comes from the fact that, as we interpret relevant staff reports, the Commission had approved at least two homes on the same sloping north side of the road as Landgate's parcel. Those approvals are clear indications that but for the lot line adjustment issue, Landgate's application to build the house and related structures on its property could and would, through the normal negotiation process, have been approved by February 1991 or shortly thereafter. Instead, the Commission's unlawful preoccupation with the lot line adjustment made it impossible for Landgate to move forward with an economically viable use of its property. We thus reject the Commission's suggestion that no taking occurred because

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6/ (...continued)
reduction in the size of fill slopes, change in the driveway entry design from a rectangular courtyard concept to a hammerhead turnaround, elimination of the guest house, relocation of the pool to up near the road, and elimination of a subterranean area of the residence." As we interpret this language, the grading reduction was thus largely the result of changing the driveway design, eliminating the guest house, relocating the pool, and eliminating a subterranean part of the house.

We note as well that the final grading number was considerably higher than the approximately 500 cubic yards described by Landgate at the April 1991 Commission hearing when Landgate's reconsideration request was denied.

Landgate could not establish their entitlement to a coastal permit.

II

Damages

Following a bench trial, the court awarded Landgate temporary taking damages of $155,657. It first set the period of the taking as beginning with the date of Commission's permit denial (February 7, 1991) and ending with the date the Commission issued a permit (February 16, 1993).[7] The court then determined that the "temporary lost value" of the property was $675,000, based on the conclusion that the property was worth $675,000 when bought for that price (a figure both experts agreed represented the property's value before the permit denial) and had been "rendered worthless" by the denial (as testified by Landgate's expert).[8] The court then multiplied $675,000 by a 10 percent rate of return (as recommended by Landgate's expert) for the period of the taking. The court next added $17,214 in property taxes (which it found had been paid on the property over the two years) plus a 10 percent rate of return thereon. We affirm.

7/ The court thus rejected Landgate's claim to taking damages allegedly incurred before the permit denial and after the permit was issued. Landgate does not appeal that aspect of the award.

8/ The Commission's expert testified the property lost 50 percent of its value because of the permit denial.

A. The Method of Calculation

Both parties claim trial court error with respect to the damages award. The Commission raises three challenges: (1) the court improperly based its calculations on the entire value of the property; (2) it improperly used 10 percent as the market rate of return; and (3) it awarded compensation for property taxes that were based on an inaccurate assessed property value. Landgate says the court should have used the fair rental value method as the basis for the damages calculation, i.e., the award should have been "based upon what the property would have been worth to [Landgate] had [Landgate] developed the property as ... planned...." Landgate's expert placed that value at $744,155.

The Commission acknowledges that pertinent case law reveals "there is no general formula for awarding damages for a temporary taking, and that an owner's indemnity may be measured in various ways depending on the circumstances...." The Commission espouses as applicable here the formula set forth in *Wheeler v. City of Pleasant Grove* (11th Cir. 1987) 833 F.2d 267, 271. After acknowledging that the question to be asked when calculating compensation for a taking is the owner's loss, the *Wheeler* court formulated its approach. "In the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. [Citation.] The landowner's compensable interest, therefore, is the return on the portion of fair market value that is lost as a result of the regulatory restriction. Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction. [Citation.]" (*Ibid.*)

We find *Wheeler* factually distinguishable. The property was under contract between sellers, Mr. and Mrs. Wheeler, and a developer/buyer. The buyer had made a $1,000 down payment, had seen the project through an Alabama city's planning commission approval, and had paid for and received city building permits to construct an apartment complex, when the city council enacted an ordinance banning construction of apartment buildings. The Wheelers and the developer sued the city. The sale apparently had fallen through. One of the issues on appeal was the question of allocation of damages between the plaintiffs. Both plaintiffs were, however, clearly interested in the land only as a matter of investment, unlike the situation in this case. The loss of potential income was pivotal to the appellate court, which criticized the trial court's analysis because it did not take into account the Wheelers' "loss as measured by the formula we set forth ... that is, the loss in income-producing potential...." (*Wheeler v. City of Pleasant Grove, supra*, 833 F.2d at p. 271.)

Moreover, the *Wheeler* plaintiffs did not raise a Fifth Amendment takings claim. Instead, they brought suit under federal civil rights statutes (42 U.S.C. §§ 1983, 1985) and alleged due process violations under the Fourteenth Amendment. (*Wheeler v. City of Pleasant Grove* (5th Cir. 1981) 664 F.2d 99.) Thus, in contrast to this case, the Fifth Amendment takings question of whether any economically viable use of the land remained was not at issue.

Landgate, on the other hand, asks too much of the decision in *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304. *First Lutheran* was a remedies case. The case began its appellate trek after the trial court granted the County's motion to strike the amended complaint's allegations that County enactment of an interim ordinance banning construction or reconstruction in a mountain area flooded a

year earlier had denied plaintiff all use of property it owned in the flooded area. (The property was a camp improved with buildings.) The high court held that the just compensation clause of the Fifth Amendment requires government to pay for temporary regulatory takings.

Landgate offers *First Lutheran* as support for its claim that the rental value method should have been adopted by the trial court in this case. While *First Lutheran* does not reject a rental value method, and indeed discusses it in the context of compensation awards for direct temporary takings of built-out properties by the federal government during World War II, the court used the World War II cases to make its point that "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation. [Citation.]" (*First Lutheran Church v. Los Angeles County, supra*, 482 U.S. at p. 318.) As Landgate acknowledges, however, the court refused to sanction any specific method of calculating damages resulting from a temporary regulatory taking.

Moreover, the cases cited in *First Lutheran*, and by Landgate, involved developed property with an existing use, or a readily calculable value based on an existing lease, not, as here, a vacant parcel intended for development into a single family residence. The state of the property in those cases eliminated the need to speculate about value. In contrast, Landgate's argument requires a court to assume the existence of the house it intended to build. The trial court would have been justified under the circumstances in rejecting the rental value approach because it was too speculative.

Neither the Commission nor Landgate cites binding case law or statute concerning the measure of damages for a

temporary taking of an undeveloped residential parcel, and we are not prepared to declare that a particular method of calculation must be applied where such a taking occurs. Choice of the proper method seems to depend on the particular facts of a case. The trial court's choice of the "garden variety appraisal" approach was appropriate in this case.[9]

The court was entitled to reject Landgate's expert's conclusion that rental value was the appropriate measure and to accept the Commission's expert's testimony that using a lost rental value method on a proposed structure was illogical. Similarly, the court was entitled to reject the investment-based *Wheeler* approach, as Landgate's expert had done, and accept the alternative suggested by the Commission's expert.

In the absence of controlling authority to the contrary and in light of supporting expert testimony, we find nothing irrational or unreasonable in the trial court's choice of which method of calculation was appropriate in this case. On the contrary, we conclude the court's choice was proper.

B. Rate of Return

The Commission contends the trial court should have used the 5 percent rate of return suggested by its expert, rather than the 10 percent offered by Landgate's expert. The Commission claims the choice of 10 percent "was not supported by substantial evidence because it was based on a mistaken

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9/ The Commission's expert described his alternative as "a common ordinary garden variety appraisal which is exactly what I would do if a governmental agency were acquiring the property for two years for a construction site."

assumption about the rate of prejudgment interest in inverse condemnation cases."

Landgate's expert testified in her deposition that she based her 10 percent figure on "prejudgment interest." At trial she testified that she based her choice of 10 percent on "a market rate of interest which I assumed at 10 percent based upon rental, based upon borrowing cost and also pre[judgment] interest as well of 10 percent per year." As we understand this evidence, the trial court would have been justified in concluding that the expert's choice of a 10 percent rate of return was not, as the Commission asserts, based solely on the prejudgment interest rate. As a result, the Commission's contention fails.

C. Property Tax Award

The trial court found that Landgate "expended $17,214 on property taxes for the subject property over the two year taking period." The Commission claims insufficient evidence supported that finding, but takes issue only with the amount of the award, arguing that since, according to its expert's testimony, the assessed value of the property was $337,500, not $675,000, the property tax for the period was only $8,648.

The critical question, however, was not a theoretical assessment of the property's value, but the amount actually incurred or paid in taxes during the relevant period. While such an amount is easily established, for example, with cancelled checks or a tax bill, the record does not show what Landgate paid or incurred in taxes. Landgate asks us to take judicial notice of a "Certificate of Payment" from the Los Angeles County Tax Collector attached as an exhibit to its respondent's brief. The Commission replies that the certificate

shows neither the amount of taxes actually assessed nor the amount actually paid. We decline Landgate's request for judicial notice because it is pointless. The certificate deals only with assessed value and does not establish the fact or amount of the liability. There was no substantial evidence to support the award of property taxes.

III

Code of Civil Procedure Section 1036 Expenses

On its cross-appeal, Landgate also contends the trial court erred in denying its request for attorney fees incurred in the writ of mandate proceeding.

After prevailing on its petition for writ of mandate in the trial court, Landgate moved for attorney fees and costs under Code of Civil Procedure section 1036 (hereinafter section 1036). The trial court denied the attorney fees request and awarded $619.50 (of $63,647.18 requested) in costs. We awarded Landgate its costs on appeal in its successful defense of the trial court's ruling. The Commission ultimately paid Landgate $1,434.01 for litigation costs arising from the mandate proceedings.

Following the damages trial, Landgate sought just under $403,000 in attorney fees ($266,100) and costs ($136,714.27) for the entire action pursuant to section 1036, including costs and $155,351 in attorney fees for the trial and appellate defense in the writ of mandate proceeding. The trial court denied fees and costs for the writ proceeding and awarded Landgate $122,395.73 in attorney fees ($99,269) and costs ($23,126.73) incurred during the inverse condemnation proceeding.

At the time of the trial court's determinations, section 1036 provided, as pertinent: "In any inverse condemnation proceeding brought for the taking of any interest in real property, the court rendering judgment for the plaintiff by awarding compensation for such taking, . . . , shall determine and award or allow to such plaintiff, as a part of such judgment . . . , such sum as will, in the opinion of the court ...,reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding."[10] (Emphasis added.)

Landgate's pleading in the trial court was titled, "Verified Petition for Writ of Mandate and Complaint for Declaratory Relief, Taking Without Just Compensation and Deprivation of Civil Rights." (Some caps. omitted.) Landgate moved to "sever" the proceeding under Code of Civil Procedure section 598, so that the first two causes of action, for writ of mandate and declaratory relief, could be heard first, receiving calendar preference, and the remaining causes of action be tried, or otherwise addressed, in the normal course of events.[11]

10/ Effective January 1, 1996, section 1036 was amended, as relevant, to extend its application to "any appellate proceeding in which the plaintiff prevails on any issue in that proceeding."

11/ Code of Civil Procedure section 598 grants a court discretion following notice and a hearing, upon written motion, timely made, to order "that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case" "when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby."

(continued...)

Landgate says it was entitled to section 1036 costs and fees for the entire proceeding, including the writ of mandate proceeding, because success on its claim that the Commission had overstepped its jurisdiction and the consequent invalidation of the permit denial was, under California case law, a prerequisite to litigation of its right to damages.

The Commission does not dispute Landgate's assertion that resolution of the mandate claim was a prerequisite to pursuing its inverse condemnation claim.[12] Instead, the Commission says that Landgate's argument is "irrelevant to the issue of reimbursement under section 1036" because the statutory language describes eligible expenses only as those "'actually incurred' in the inverse condemnation proceeding" and

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11/ (...continued)

"Severance is, in effect, the 'flip side' of consolidation: i.e., it is the procedure whereby the court may order separate trials of issues or parties joined in a single action. [¶] Where a separate trial is ordered on the issue of liability, the procedure is commonly referred to as 'bifurcation.' But it is still a severance and governed by the Code provisions applicable to severance. (The objective of bifurcation ... is to avoid wasting time and money on the trial of damages issues if the liability issue is resolved against the plaintiff.) [Citation.]" (Weil & Brown, Cal. Practice Guide: Civ. Proc. Before Trial (Rutter 1996) Case Management & Trial Setting, § [12:406], p. 12(1)-76.) Code of Civil Procedure section 598 bifurcation also "prevents possible prejudice to a defendant where a jury might look past liability to compensate a plaintiff through sympathy for his or her damages." (Id. at § [12:414], p. 12(1)-78.)

12/ Indeed, in the trial court, the Commission argued in support of its demurrer to all seven causes of action that "Landgate must establish the invalidity of the Commission's action before seeking to recover on an inverse condemnation claim." (Some caps. omitted.)

Landgate's expenses in the mandate proceeding were not so incurred. The statutory language actually provides that the specified expenses are to be reimbursed if "actually incurred because of [any inverse condemnation proceeding.]" (Code Civ.Proc., § 1036, emphasis added.)

Since Landgate had to resolve the propriety of the permit denial before it could litigate whether that denial constituted a taking, entitling Landgate to just compensation, resolution of the mandate claim was part of the inverse condemnation proceeding and any statutory fees and costs incurred in resolving the mandate claim were "actually incurred because of" such proceeding.[13] (Code Civ. Proc., § 1036.)

13/ Because we hold that section 1036 requires reimbursement of attorney fees and costs incurred in the mandate litigation, we need not address the Commission's assertion, predicated on a contrary conclusion, that the trial court was required to apportion between the mandate and inverse condemnation proceeding expenses. We note, however, that none of the cases cited by the Commission addressed a situation where, as here, a landowner succeeded on a mandate claim for a taking by overregulation, a prerequisite to a later successful finding that a taking had occurred and an award of damages therefor. Instead, the cited cases required allocation of attorney fees or attorney fees and costs (1) where the litigation involved inverse and direct condemnation, on one hand, and nuisance-personal injury claims, on the other, in which the appellate court remanded because it could not tell which attorney fees had been awarded on which claims (*Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86 [airplane overflights, landowners' lawsuits consolidated with City's direct condemnation suits and bifurcated into condemnation and nuisance trials]), (2) where a landowner's claims of nuisance, negligence and trespass for flooding was bifurcated into liability and damages segments (*Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914), (3) where the appellate court affirmed a judgment based on a jury's findings of liability and damages

(continued...)

The Commission's claim that the trial court did not abuse its discretion in denying the mandate expenses misses the mark. Section 1036 provides that a court "shall determine and award or allow" such sum as will, in its opinion reimburse the plaintiff. (Emphasis added.) The section thus requires an award (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368,390); the amount of the award is a matter of discretion. On remand, Landgate will have to establish the reasonableness of its fees and costs.

The Commission also asserts that Landgate's claim for fees and costs in the mandate proceeding is barred under the doctrines of res judicata and collateral estoppel. We agree that to the extent Landgate was awarded and paid non-section 1036 costs in the mandate proceeding, and did not challenge the reasonableness thereof by filing a cross-appeal in the mandate proceeding, that issue is resolved. However, in light of our holding that Landgate is entitled to section 1036 expenses for the mandate proceeding, on remand the trial court will review Landgate's substantiation of those expenses to determine, in its discretion, whether Landgate has sufficiently identified those expenses and whether the amounts claimed are reasonable, pursuant to the statute.

13/ (...continued)
in landowner's claims of inverse condemnation and nuisance for flooding and reversed and remanded only because the trial court improperly calculated the amount of prejudgment interest due on the damages award (*Imperial Cattle Co. v. Imperial Irrigation Dist.* (1985) 167 Cal.App.3d 263), or (4) where a city's direct condemnation and landowner's inverse lawsuits were consolidated and then bifurcated into liability and damages phases (*Los Angeles v. Waller* (1979) 90 Cal.App.3d 766 [appellate court addressed reasonableness of trial court's section 1036 award]).

We reject the Commission's implicit argument that Landgate is barred from claiming section 1036 expenses because it did not claim its entitlement to them on a cross-appeal from the mandate action. At that point, had Landgate made a section 1036 expenses claim to this court, we would have denied its request as premature, because Landgate had not yet shown a taking had occurred. Landgate has now established the taking element and is entitled to section 1036 expenses in such reasonable amount as the trial court may find.

IV

Title 42 United States Code Section 1983

Landgate claims the trial court erred by sustaining the Commission's demurrer to Landgate's cause of action for violation of civil rights under Title 42, United States Code, section 1983 (hereinafter section 1983), and compounded the error by granting the Commission's motion to quash service on individual commissioners and staff members after Landgate amended its section 1983 claim to name them as individual defendants.

In its seventh cause of action, Landgate claimed the Commission's 1991 permit denial violated section 1983. The claim was asserted against the Commission only. The trial court sustained the Commission's demurrer on the ground that the State and its agencies were not "persons" within the meaning of section 1983 (*Rossco Holdings Inc. v. State of California* (1989) 212 Cal.App.3d 642, 661). The section 1983 claim was dismissed February 24, 1991. The trial court's action was proper because the State and its agencies are not "persons" within the meaning of the federal civil rights act.

(*Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 71; *Pyne v. Meese* (1985) 172 Cal.App.3d 392, 405.)

On February 14, 1992, Landgate sought to amend its complaint by naming individual Commission members and staff as Does 1 through 17.[14] On February 18, the trial court stayed trial court proceedings until appellate proceedings were concluded. On February 19, a Deputy Attorney General informed Landgate's counsel the Attorney General was not authorized to accept service for any individuals and that Landgate would have to serve individual defendants individually. The stay was lifted on April 23, 1993, and Landgate resumed efforts to serve the individuals. Counsel for the parties agreed that a motion to quash was the best way to resolve the propriety of Landgate's move. The Commission moved to quash on the ground that the claims against the individuals were time barred. On October 5, the trial court granted the motion.

We find no error in the trial court's grant of the Commission's motion to quash. The limitations period in California for asserting a claim under section 1983 is one year. (*City of Huntington Park v. Superior Court* (1995) 34 Cal.App.4th 1293, 1297; *Trimble v. City of Santa Rosa* (9th Cir. 1995) 49 F.3d 583, 585.) Landgate does not specify a date on which its section 1983 cause of action accrued. Contrary to its suggestion that the statute did not begin to run until "the state court render[ed] a final decision" on its permit application, the cause of action arises when the agency issues a final decision ripe for review. (*Norco Constr., Inc. v. King County* (9th Cir. 1986) 801 F.2d 1143, 1146.) Thus, Landgate's naming of individual defendants on February 14, 1992, occurred more than a year after the February 7, 1991,

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14/ This amended complaint does not appear in the record.

permit denial. Its section 1983-based cause of action was time barred.

We reject Landgate's assertion that its claims against individual commissioners and staff were not untimely because they originally had been named as Doe defendants and, as a result, the claims against them related back to the initial section 1983 claim.

"In order to relate an amended complaint back to the original complaint to avoid the statute of limitations, the plaintiff must be genuinely ignorant of the defendant's identity or the facts rendering the defendant liable when the original complaint was filed. [Citations.] When it appears that plaintiff knew both the person's identity and the facts giving rise to liability when the complaint was filed, but did not name him, that person cannot be served as a Doe after the statute of limitations has run. [Citation.]" (*Taito v. Owens Corning* (1992) 7 Cal.App.4th 798, 802.)

There was more than sufficient evidence for the trial court to conclude that Bogart and Petrovsky knew the identity of each staff person and commissioner involved in the decision when Landgate filed its March 26, 1991, petition/complaint. The transcript of Commission proceedings on February 7, 1991, and other Commission documents were attached to the petition/complaint, which itself reflects Landgate knew the identities of the individuals involved in the denial when the denial occurred. Not only had Petrovsky dealt with staff before the hearing, but the transcript identifies commissioners and staff members involved in the denial. The transcript also reflects that Bogart and Petrovsky attended the February 7, 1991, meeting. The trial court properly granted the Commission's motion to quash.

DISPOSITION

We reverse (1) the award of property taxes and (2) the denial of Landgate's request under section 1036 for costs and fees incurred in the writ of mandate proceeding. The matter is remanded for the trial court's determination of Landgate's section 1036 expenses, including Landgate's appellate defense of the trial court's grant of the petition for writ of mandate. In all other respects, the judgment is affirmed. Landgate is awarded its costs on this appeal.

CERTIFIED FOR PARTIAL PUBLICATION

ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MASTERSON, J.

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APPENDIX C

NOT TO BE PUBLISHED

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE**

FILED Dec 18 1992

LANDGATE, INC., et al.,	)	
	)	
Plaintiff and	)	
Respondent,	)	No. B063485
	)	
v.	)	Super. Ct. No.
	)	BC 024391
CALIFORNIA COASTAL	)	
COMMISSION,	)	
	)	
Defendant	)	
and Appellant.	)	
	)	

APPEAL from an order of the Superior Court of Los Angeles County. Emilie Elias, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Jan S. Stevens, Assistant Attorney General and Peter H. Kaufman, Deputy Attorneys General, for Defendant and Appellant.

Reznik & Reznik, Benjamin M. Reznik, Fred N. Gaines, and John M. Bowman for Plaintiff and Respondent.

INTRODUCTION

Respondent/defendant California Coastal Commission (hereinafter Commission) appeals from the trial court's order issuing a writ of mandate vacating the Commission's disapproval of a lot reconfiguration and proposed home building project on an unimproved Malibu lot owned by petitioner/plaintiff Landgate, Inc. We affirm the order issuing the writ.[1]

FACTS

Sometime before 1973, a large unimproved Malibu tract which included what is now Landgate's lot and the adjoining parcel was approved for subdivision into approximately two-acre lots, each zoned for a single-family home. After the subdivision, Landgate's predecessor owned both lots, running

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1/ The order issuing the writ is appealable. (Code Civ. Proc. §§ 1094.5, subd. (g); 1110.) Without objection, the trial court severed consideration of the writ petition from Landgate's causes of action seeking declaratory relief and compensatory damages for unjust taking and civil rights violations. Landgate's remaining causes of action remain pending in the trial court and are not before us.

north and south and containing sloped northern and flat southern sections. One lot contained a single family home on its flat southern portion. Both lots are within the coastal zone in which development is subject to Coastal Act regulation by the Commission.

In the mid-1980's, the County of Los Angeles planned to improve an east-west road through the two parcels. The proposed road divided the lots into sloped northern and flat southern portions. Landgate's predecessor and the county agreed that, in exchange for the owner's dedicating portions of the parcels for the roadway easement, the county would reconfigure the lots into a single sloped lot north of the road and a single flat lot, containing the existing home, south of the road. Each lot remained zoned for one single family home. The county completed the road project and formally approved the lot reconfiguration, which was recorded on July 5, 1989. "The COMMISSION was aware of and approved the contemplated improvement of [the road]." The Commission earlier approved the county's Malibu land use plan (LUP) but at all relevant times had not yet certified a county Malibu local coastal program (LCP.) The previous owner did not seek or receive Commission approval of the lot reconfiguration. The Commission did not challenge the county's reconfiguration approval.

In October 1990, Landgate bought the sloped northern lot and applied for and received county approval for a single family home on the lot. Mr. and Mrs. Peter Bogart own a life estate in Landgate's lot. Landgate then applied to the Commission for approval. The lot overlooks a canyon, portions of which are being converted into a park. Landgate originally proposed a 9,036 square foot home requiring 8,500 cubic yards of fill. Landgate later modified its proposal,

reducing the home to 7,500 square feet requiring 4,300 cubic yards of fill.

The Commission considered Landgate's modified proposal at its December 13, 1990, hearing. On that date, the Commission's staff first questioned whether Landgate's lot was legal under the Coastal Act. The Commission continued the hearing to study that question. On February 7, 1991, the Commission denied Landgate's application, finding that Landgate's lot constituted impermissible "development" under the Coastal Act because it was created without Commission approval, and the proposal would produce excessive soil, grading, and visual degradation. Later, the Commission denied Landgate's reconsideration request which included a newly modified proposal reducing grading to approximately 500 cubic yards, eliminating visible retaining walls, and reducing the building's height, designed to meet Coastal Act requirements. During this process, the Commission approved two other proposed homes on nearby lots in the sloped area north of the road.

Landgate then sued and, among other relief, petitioned for a writ of mandate. Landgate claimed the Commission used the lot reconfiguration disapproval as leverage to force greater concessions on the project, with a ban an any construction as the ultimate threat. On October 24, 1991, the trial court issued the writ, vacating the Commission's denial of the project and ordering it to reconsider the application assuming the lot reconfiguration valid.

The Commission scheduled the matter for its November 14, 1991, San Diego meeting. Although Landgate prepared for and traveled to the meeting, the Commission continued the matter until its December meeting without conducting a hearing. On November 21, 1991, the Commission filed a

return stating the parties were exploring a settlement involving approval of a smaller project on Landgate's lot. Landgate claimed that, during the continuing negotiations, the Commission told Landgate that, unless Landgate agreed in advance to waive its damage and attorney's fees claims, the Commission likely would appeal the order and conduct no hearing. Landgate refused. At its December 10, 1991, meeting, the Commission announced it would appeal the order and conducted no hearing.

ISSUE

The Commission contends, and Landgate disputes, that the Coastal Act gave it jurisdiction over the lot reconfiguration despite its approval of the county's LUP and failure to challenge the county's approval of the lot reconfiguration.[2]

DISCUSSION

Two aspects of "development" are involved here. First, Landgate's proposed project requires building new structures. Second, the lot reconfiguration may constitute "development" if it permits building where it otherwise would not occur. The parties correctly agree that the Coastal Act empowers the

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2/ Because we reject the Commission's contention and affirm the order, we need not address Landgate's alternative arguments supporting the order that the Commission is estopped from disapproving the lot reconfiguration and that it abused its discretion in denying Landgate's application. Moreover, because the issue is not before us and the City of Malibu is not a party, we decline Landgate's request to retroactively exempt the project from Malibu's building moratorium. We deny Landgate's sanctions request.

Commission to control "development" in the coastal zone, and that Landgate's proposed project, i.e., the home and its related grading, retaining walls, etc., is "development" subject to such control.

Regarding the second type of development, the Commission concedes that the lot reconfiguration caused no increase in the number of lots or homes, but argues it had a negative qualitative impact on the coastal zone by permitting building where it otherwise would not have occurred. Thus, the Commission concludes, it properly could reject the reconfiguration as new "development" inconsistent with the Act.

On this record, we disagree. The Commission's argument contains three serious false assumptions: 1) Landgate chose to build on the sloped northern, with negative environmental impact, rather than flat southern, without negative environmental impact, side of the road; 2) Landgate, not the Commission, is responsible for and should bear the consequences of the lot reconfiguration; and 3) any development on Landgate's lot is inconsistent with the Coastal Act.

First, Landgate was not involved in the decisions to build the road and reconfigure the lots. Landgate purchased a properly recorded single sloped lot north of the road which was zoned for a single-family home. Landgate cannot build south of the road, in an environmentally less sensitive area, because it owns no property south of the road.

Second, after the subdivision, Landgate's predecessor owned two valid, properly recorded lots, each zoned for, and one already containing, a single-family home. The Commission essentially concedes it would approve in principle construction

on the flat area south of the road. However, the Commission approved both the county's Malibu LUP and the road. It was the road, not any decision by Landgate, that rendered the existing lot configuration impractical and created the potential for "development" on what is now Landgate's lot. The previous owner might not have granted the road easements if the result was two lots, each split by the road. Rejecting the lot reconfiguration results in Landgate's being denied any use of its property. The reconfigured lot resulted from action approved by the Commission in which Landgate played no part.

Moreover, we find unpersuasive the Commission's related point that, although its action leaves Landgate with a useless lot, Landgate has not been treated unfairly because it may pursue remedies against the previous owner. Absent the unlikely scenario that the previous owner expressly told Landgate that the Commission expressly approved the lot reconfiguration, we think the Commission's suggested "remedy" for its essentially depriving Landgate of its property without compensation illusory. While the parties presumably knew that the Commission would regulate and had to approve any proposed building on the reconfigured lot, they would not reasonably have assumed that express Commission approval was required for the reconfiguration itself where, as here, it was approved and recorded by the county as part of the road development and LUP approved by the Commission.

Third, the Commission assumes that any building on Landgate's lot is inconsistent with the Coastal Act. The Act is designed to "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources" (Pub. Res. Code, § 30001.5, subd. (a)), while recognizing that "future developments that are carefully planned and developed

consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone." (Pub. Res. Code, § 30001, subd. (d).) The Act is designed to assure protection of the zone's scenic and visual qualities, minimize natural landform alteration, and avoid erosion and degradation of parks and recreation areas. (Pub. Res. Code, §§ 30251, 30253, subd. (2), 30240, subd. (b).) However, the Act "is not intended, and shall not be construed as authorizing . . . the commission . . . to exercise [its] power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor," and "is not intended to increase or decrease the rights of any owner of property under the Constitution of . . . California of the United States." (Pub. Res. Code, § 30010.) However, the Commission negotiated with Landgate before and after it questioned the lot's legality. Thus, the Commission contemplated some building on the lot. Moreover, the Commission approved proposed homes on nearby lots in the sloped area. While we recognize that each lot has unique topography and impact on surrounding areas, the Commission's approval of two nearby projects in the sloped area rebuts its claim that building on Landgate's lot would appreciably degrade the area. In fact, this record demonstrates that the Commission used the "illegal lot reconfiguration" issue as leverage to extract greater concessions from Landgate.

We stress that the Commission retains its ability to regulate and approve any proposed building on the lot. Moreover, we limit our analysis to the peculiar facts before us. We do not address whether under other circumstances the Commission properly could reject a lot reconfiguration. On this record, the trial court properly issued the writ.

DISPOSITION

We affirm the judgment (order issuing writ of mandate). Landgate is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P. J.

ARANDA, J.*

---

* Assigned by the Chairperson of the Judicial Council.

APPENDIX D

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ORIGINAL FILED
AUG - 9 1993
LOS ANGELES
SUPERIOR COURT

LANDGATE, INC.,	)	No. BC 024 391
	)	
Petitioner and	)	**ORDER GRANTING**
Plaintiff,	)	**SUMMARY**
	)	**AJUDICATION OF**
vs.	)	**ISSUES IN FAVOR OF**
	)	**PLAINTIFF**
CALIFORNIA COASTAL	)	**LANDGATE, INC.**
COMMISSION; and	)	
DOES 1 through 100,	)	DATE: June 14, 1993
inclusive,	)	TIME: 8:30 a.m.
	)	PLACE: Department 20
Respondents and	)	
Defendants.	)	MOT. C/O: June 30, 1993
	)	DIS. C/O: Not Yet Set
	)	
	)	TRIAL DATE: Not Yet Set
	)	

Plaintiff Landgate, Inc.'s ("Landgate") motion for summary adjudication of issues came on regularly for hearing on June 14, 1993 in Department 20 of the above-referenced court, the Honorable Richard C. Hubbell, Judge presiding. Fred N. Gaines of Reznik & Reznik appeared on behalf of the moving party Landgate. Peter H. Kaufman, Supervising Deputy Attorney General, appeared on behalf of defendant California Coastal Commission ("Commission").

After full consideration of the evidence, the separate statements submitted by each party, and the authorities submitted by counsel, as well as oral argument by counsel, the court finds that no triable issue of material fact exists as to the issue of liability raised in the third cause of action of Landgate's Verified Petition for Writ of Mandate and complaint for taking of private property without just compensation, and that summary adjudication should be granted with regard to the following issue:

ISSUE ONE: Landgate's third cause of action for taking of property without just compensation in violation of the 5th and 14th Amendments to the United States Constitution and Article I, Section 19 of the California Constitution is meritorious as a matter of law and there is no defense thereto because Landgate has been deprived, at least temporarily, of all economically viable or productive use of its property insofar as Landgate, at least temporarily, could not legally obtain any valid permits or approvals to construct any project on its property as a result of the Commission's actions.

In accordance with Code of Civil Procedure section 437c, the court ruled that such a taking has occurred as demonstrated by the factual material (Separate Statement

of Undisputed Facts, Undisputed Material Fact Nos. 1-17 and Supporting Evidence in Support Thereof), case law and statutes cited.

The court denied Landgate's motion for summary adjudication of issues as to Issue No. 2 and Issue No. 3 stated therein, finding such issues to be moot as a result of the ruling set forth above.

The final judgment in this action, in addition to any other matters determined at trial, shall award judgment in accordance with the matters so adjudicated in this order.

IT IS SO ORDERED.

DATED: August -9 1993

/s/ RICHARD C. HUBBELL
JUDGE OF THE SUPERIOR COURT

2418446.01

APPENDIX E

SUPERIOR COURT
FOR THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

FILED
OCT 16 1991
JAMES H. DEMPSEY
CLERK

LANDGATE, INC.,	)	CASE NO. BC 024 391
	)	
Petitioner and Plaintiff,	)	**PARTIAL JUDGMENT GRANTING PEREMPTORY WRIT OF MANDATE**
	)	
-vs-	)	
	)	
CALIFORNIA COASTAL COMMISSION; and DOES 1 through 100, inclusive,	)	
	)	
Respondents and Defendants.	)	
	)	
	)	

The Court having granted Petitioner's Motion to Sever the First Cause of Action for early trial, the First Cause of Action for Writ of Mandate in the above-entitled matter came on for trial on October 4, 1991 in Department 85 of this Court, the Honorable Emilie Elias, Commissioner, presiding by stipulation and without a jury. Fred N. Gaines, Esq. and Benjamin M. Reznik, Esq. of Reznik & Reznik appeared on behalf of Petitioner and Plaintiff, LANDGATE, INC. Alan V. Hager, Deputy Attorney General, appeared on behalf of Respondent and Defendant, the CALIFORNIA COASTAL COMMISSION. The Administrative Record having been received into evidence without objection, and the matter having been briefed, argued and submitted for decision, it is ORDERED, ADJUDGED AND DECREED:

1. A Peremptory Writ of Mandate shall issue from this Court commanding Respondent, the CALIFORNIA COASTAL COMMISSION ("COMMISSION"), to set aside its action of February 7, 1991 denying Petitioner's application for a Coastal Development Permit (Application No. 5-90-921), and ordering that the COMMISSION reconsider such application at its next meeting for which proper notice can be given and take action in all due speed on such application consistent with this judgment.

2. The Court finds that based on the factual circumstances in this case, the definition of "development" as found in Public Resources Code §30106 does not include the lot line adjustment approved and recorded by the County of Los Angeles in 1989 with regard to the subject property. Therefore, upon remand to the COMMISSION, the COMMISSION must consider Petitioner's application without any reference or consideration of the lot line adjustment. The

COMMISSION is to consider the subject property to be a legal lot.

3. The Court will retain continuing jurisdiction over this matter for all purposes.

DATED: October 16, 1991

/s/ Emilie Elias
THE HONORABLE EMILIE ELIAS
SUPERIOR COURT COMMISSIONER

Approved as to Form:

/s/ Alan V. Hager
ALAN V. HAGER
Deputy Attorney General
For Respondent
CALIFORNIA COASTAL COMMISSION

2418431.01

Supreme Court, U.S.
FILED
AUG 27 1998
OFFICE OF THE CLERK

No. 98-183

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

LANDGATE, INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
RICHARD M. FRANK
Assistant Attorney General
PETER H. KAUFMAN
Deputy Attorney General
JOSEPH BARBIERI*
Deputy Attorney General
*Counsel of Record
2101 Webster Street, 12th Floor
Oakland, California 94612-3049
Telephone: (510) 286-3822
Counsel for Respondent

29 pp

QUESTION PRESENTED

Where an agency reasonably but erroneously believed that a lot proposed for development had been created illegally without an agency permit, whether the delay in use resulting from judicial clarification of the lot's legality constituted a "temporary" taking of property for which damages are available under the Federal Constitution.

PARTIES BELOW

Landgate, Inc. is the only petitioner before this Court. Peter Bogart and Punty Bogart, who alleged below that they possessed a life estate in the property during the period of the alleged temporary taking and who were parties in the proceedings before the California trial and appellate courts, did not join the petition. See pp. 7-9 *infra*.

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Uelmen, *Playing Center*, California Lawyer, July 1998 at 45 19

The California Coastal Commission respectfully requests that this Court deny the petition for a writ of certiorari.

JURISDICTION

The Court lacks jurisdiction because the petitioner Landgate, Inc. ("Landgate"), does not have standing to petition for a writ of certiorari. Landgate asserts only a remainder interest in the property alleged to have been taken. The owners of the life estate, Peter and Punty Bogart, alone have standing to pursue a claim for temporary takings damages, and they did not join the petition. See pp. 7-9 *infra*.

STATEMENT

A. Introduction

Throughout this litigation Landgate has assumed that every mistake made by a land use agency which delays the development of vacant property constitutes a compensable temporary "taking." Yet this Court has established that there is a wide range of government actions that "deny" or delay the use of property but which do not necessarily constitute takings. For example, the imposition of a permit system does not constitute a taking, even though it prohibits the development of property until the landowner complies with the permitting process. *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985). The observation, then, that a particular government action prevents the use of property marks the beginning of the takings analysis, not the end of it.

Far from representing any departure from this Court's regulatory takings doctrine, the California Supreme Court's decision in this case applied a principle that was previously recognized by this Court in *First English Evangelical Lutheran Church* v. *Los Angeles County*, 482 U.S. 304 (1987) ("*First English*"): "normal delay" in the permit process does not constitute a regulatory taking. This principle is compelled by *Riverside Bayview Homes*; if the imposition of a permit requirement itself is not a taking, neither is the delay

associated with seeing that process to its completion.

The California Supreme Court here applied the principle of normal permit delay to a discrete set of facts. Among other grounds, the Commission, relying on the advice of its legal counsel, denied Landgate's application on the ground that the lot on which Landgate proposed to build was illegal because its boundaries had been reconfigured without a coastal permit. The state court of appeal determined that the Commission incorrectly asserted permit jurisdiction over the lot line reconfiguration and that the reconfigured lot was legal. With the issue of the lot's legality now resolved, the Commission for the first time was in a position to make a final use determination, and it promptly approved the project with mitigating conditions. The delay encountered by Landgate during resolution of the lot's legality was not a taking.

Landgate admits that *First English* recognized the difference between temporary takings and noncompensable permit delay. Landgate Pet. at 13. In order to elevate the California Supreme Court's unexceptional application of the normal permit delay principle into a reviewable issue, Landgate contends that the principle of normal delay does not apply where an agency makes a mistake during the decisionmaking process and development is postponed while courts review the agency's action. But neither *First English* nor *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), the two cases upon which Landgate places the most reliance, ever suggested that the principle of normal permit delay was inapplicable where the delay was partly attributable to judicial review of an agency's interim permit error.

Moreover, there is no conflict among lower court decisions on this issue. Federal and state courts throughout the country have uniformly recognized that delay caused by government mistakes over preliminary land use issues, such as the scope of an agency's permit jurisdiction, are an inherent part of the permit process. These normal delays do not constitute takings even though the error postponed development and even though judicial intervention was necessary to correct it. See pp. 10-

11 *infra*. The California Supreme Court properly concluded that the delay experienced by Landgate while the legality of its lot was litigated was not a compensable taking.

Finally, Landgate ignores the extraordinary implications of its argument. According to Landgate, any delay caused by a government mistake in the permitting process is a per se taking, without regard to the nature of the disputed regulatory issue, the impact of the government's action on the value of the property, or the expectations of the landowner. For example, if an agency denied a project because an applicant failed to provide a geological report required by the agency, and a court later determined that the report was not required, the delay in use caused by litigation over the necessity of the report would, in Landgate's view, constitute a compensable taking. Landgate seeks, in other words, to convert the takings clause into a tort claims statute that would hold government strictly liable for any delay in use caused by a government error in the permit process. No reasonable reading of this Court's takings jurisprudence could ever justify such a result. "[I]t is well-established that 'not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense.'" *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 82 (1980), quoting *Armstrong* v. *United States*, 364 U.S. 40, 48 (1960).

Landgate's petition for a writ of certiorari should be denied.

B. Facts

This land use dispute involves property in Malibu, California that is located in a scenic area of the Santa Monica Mountains known as Escondido Canyon. 11 CT (Clerk's Transcript) 2637. Prior to the lot line adjustment in question, there existed two narrow two-acre lots running in a north-south direction. 5 CT 1193; see 12 CT 2863, 2881. Landgate's predecessor constructed a single-family dwelling on the flat, southerly portion of one of the lots. 5 CT 1194.

After constructing a two-lane road that bisected the two

narrow lots, the County of Los Angeles approved a lot line adjustment that reconfigured the two lots into a single sloped lot north of the road and a single flat lot (containing the existing home) south of the road. 2 CT 313; see 12 CT 2863, 2881. On October 12, 1990 Landgate purchased the northern, sloped lot. 5 CT 1194. Peter and Punty Bogart acquired a life estate in this property from Landgate, which held the remainder interest. 8 CT 1836; see pp. 7-9 *infra*.

In October 1990 Landgate submitted to the Commission a coastal development permit application to deposit 8,500 cubic yards of fill and to construct a 9,036 square-foot single-family residence, swimming pool, septic system and retaining walls. 12 CT 2862, 2863. Landgate later reduced the amount of fill from 8,500 to 4,300 cubic yards and reduced the size of the house to 7,500 square feet. 12 CT 2862-2864.

In processing the application, the Commission's staff became aware that a coastal development permit had not been obtained for the lot line adjustment and reported this deficiency in its staff report. 11 CT 2638. After a public hearing, the Commission denied Landgate's permit application on three grounds. First, the Commission found that the project's massive grading violated the grading and landform alteration policies of both the Coastal Act and the Malibu Land Use Plan (LUP) that was adopted as part of the County's local coastal program, see Cal.Pub.Resources Code, §§ 30500-526. 12 CT 2866. Second, it determined that the proposed residence was not sited and designed to protect scenic views and was contrary to the visual resource policies of both the Act and the Malibu LUP. 12 CT 2888. Among other concerns, the height of the house was nine feet greater than the standard contained in the Malibu LUP. 12 CT 2866, 2868, 2901. Finally, acting under advice of its legal counsel and an earlier opinion of the California Attorney General, 12 CT 2869-70, the Commission asserted permit jurisdiction over the 1989 lot line adjustment and found that the lot line adjustment did not conform with Coastal Act policies. *Id.*

Landgate filed a petition for a writ of mandate and a

complaint seeking declaratory relief and damages for an alleged taking and a denial of civil rights. 1 CT 1. The petition for a writ of mandate was severed, with the takings issues being reserved for later adjudication. 1 CT 120, 130. The trial court issued the writ, finding that the Commission did not have permit jurisdiction over this particular lot line reconfiguration and that the Commission should reevaluate the project as if the lot reconfiguration were legal. Pet.App. at 104a-105a. The trial court did not address the validity of the other grounds for the permit denial. Limiting its decision to the "peculiar facts" of the case, the court of appeal affirmed in an unpublished decision. Pet.App. at 91a, 98a. It directed the Commission to treat the lot as legal but stressed that "the Commission retains its ability to regulate and approve any proposed building on the lot." Pet.App. at 98a.

In February 1993 the Commission reconsidered Landgate's project. By now Landgate had modified the project by reducing grading to 2,893 cubic square yards, by reducing height to 35 feet above existing grade, and by reducing the fill slope. 1 CT 193, 195. The Commission approved the revised project with additional conditions to further minimize project impacts. 1 CT 190-192. Landgate did not challenge the conditional approval. 1 CT 214.[1]

Returning to the trial court, Landgate moved for summary adjudication of its takings claim. 2 CT 268. It contended that the Commission's erroneous assertion of permit jurisdiction over the lot line reconfiguration had prevented it from using its property and constituted a temporary taking. 2 CT 258-266, 288-292. The trial court granted Landgate's motion, Pet.App. at 101a, and denied the Commission's concurrent motion for summary judgment. 4 CT 846.

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1. There is no evidence anywhere in the record to support Landgate's statement, Landgate Pet. at 4, that it was unable to build its house because it expended construction funds on litigation.

The Commission moved to dismiss the action on the ground that Landgate, as the remainderman, had no standing to pursue a temporary taking claim. 5 CT 1097. Landgate then amended its complaint to name the Bogarts as plaintiffs. 5 CT 1104. After a bench trial on damages, the trial court awarded Landgate and the Bogarts temporary taking damages of $155,657, plus costs and attorney fees. Both sides appealed.

The court of appeal affirmed the trial court's determination that the Commission had engaged in a taking. Pet.App. at 55a. The court of appeal rejected the Commission's argument that the delay caused by its erroneous assertion of permit jurisdiction over this particular lot line adjustment was a noncompensable mistake in the permitting process: "Nothing in the record suggests that the lot line adjustment issue arose out of anything other than the Commission's ongoing jurisdictional spat with the County of Los Angeles combined with a desire to prevent Landgate from building on its parcel . . . . " *Id.* at 71a.

The California Supreme Court granted the Commission's petition for review and reversed. The Court found that the case "falls squarely into the category of a normal delay" that was identified in *First English.* Pet.App. at 2a. The legality of the lot on which Landgate proposed to build was a "threshold" issue in the permitting process, and the Commission could not issue a final decision until the legality of the lot was resolved. Pet.App. at 32a. Courts are frequently called upon in the permitting process to resolve these types of interim regulatory disputes, and the Court found that nothing in *First English* contradicted its conclusion that a judicial determination of the validity of certain "preconditions to development" is a normal part of the development process. Pet.App. 32a-33a. And, unlike *Lucas*, which involved a final statutory development ban that rendered property valueless, this case involved a delay in permit processing caused by a jurisdictional dispute that prevented the Commission from issuing a final decision. Pet.App. at 27a-32a. Finally, the Court admonished that agencies may not delay permit

decisions for pretextual reasons. It found, however, that the Commission's erroneous assertion of permit jurisdiction in this case was neither unreasonable nor a pretext to deny all use. Pet.App. at 24a-25a, 31a.

Justice Chin dissented, based on his view that the Commission "opposed all development of Landgate's property regardless of the magnitude of the development," Pet.App. at 37a, a factual characterization with which the majority disagreed.

Justice Brown also filed a dissent. Justice Brown criticized this Court's *ad hoc* test in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-125 (1978) as "squishy" and so "amorphous that it is capable of producing virtually any result." Pet.App. at 44a. She stated that the majority reverted to *Penn Central* at every opportunity and ignored *Lucas's* categorical formulation, which, Justice Brown asserted, overruled pro tanto *Penn Central's* "regulatory friendly" formulation. Pet.App. at 44a, 51a. Apparently assuming that the delay in use caused by the Commission's erroneous assertion of permit jurisdiction necessarily constituted a final decision denying all economically viable use of property, Justice Brown contended that the case met the *Lucas* categorical formulation.

REASONS WHY THE PETITION SHOULD BE DENIED

I. LANDGATE, WITH ONLY A REMAINDER INTEREST, DOES NOT HAVE STANDING BECAUSE ONLY THE LIFE TENANTS HAVE A CLAIM FOR TEMPORARY TAKING DAMAGES

Landgate was the sole plaintiff in the original complaint filed in this case. 1 CT 1. The Commission moved to dismiss the action on the ground that Landgate, as the remainderman, had no standing to pursue a taking claim because damages for a temporary taking would accrue solely to the life tenants, Peter and Punty Bogart. 5 CT 1097. In response to this

motion, Landgate successfully moved to amend its complaint to include the Bogarts as plaintiffs. 5 CT 1104. The verified amended complaint stated that the Bogarts owned a life estate in the property and that Landgate is "owned and controlled" by the Bogarts. 5 CT 1191. In his deposition, however, Peter Bogart testified under oath that he and his wife held no shares in Landgate and did not control it. 8 CT 1828-1838. During the damages phase of trial, the trial court referred to the Bogart-Landgate relationship as a "sham" and as having an "odor about it." RT 226.

The judgment jointly awarded damages to Landgate and the Bogarts. 9 CT 2059. Landgate and the Bogarts each cross-appealed the judgment, 10 CT 2456, and both were named as respondents in the Commission's petition for review in the California Supreme Court. Only Landgate, however, has petitioned for review in this Court. This omission is fatal to Landgate's petition because Landgate, as remainderman, has no standing to seek temporary takings damages.

Although there is no set formula for awarding temporary takings damages, see *Corrigan* v. *Scottsdale*, 720 P.2d 513, 518-519 (Ariz.), *cert. denied*, 479 U.S. 986 (1986), damages are ordinarily calculated on the basis of lost use or lost profits during the period of the taking. See, e.g., *Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949); *Wheeler* v. *City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987). Under California law, a life tenant has the exclusive right to recover lost rents during the period of the life estate. See Cal.Civil Code, § 818; *Horstmann* v. *Sheldon*, 202 Cal.App.2d 184, 20 Cal.Rptr. 735, 740 (1962); see also 51 Am.Jur.2d, Life Tenants, § 130. In the only discovered reported decision that has addressed the specific issue, the Federal Court of Claims ruled that the life tenant alone had a right to pursue temporary takings damages arising during the period of the life estate. See *In re Riggleman*, 215 Ct.Cl. 865 (1977). Landgate therefore has no standing to assert a claim for temporary taking damages that belongs solely to the life tenant.

Moreover, Landgate is in no position to disagree with this

statement of California law. Once Landgate amended its complaint to join the Bogarts, the Commission had no reason to pursue the standing issue before the California appellate courts. By waiting until now to revive this issue, Landgate prevented the California appellate courts from deciding whether, as a matter of California law, the holder of a remainder interest has a cognizable property interest in temporary takings damages. Landgate's tactic also prevented the California courts from resolving any factual issues regarding the Landgate-Bogart relationship. Landgate's circumvention of the California courts precludes review in this Court. See, e.g, *Adams* v. *Robertson*, 520 U.S. 83 (1997).

For these reasons alone, Landgate's petition for a writ of certiorari should be denied.[2]

II. THE CALIFORNIA SUPREME COURT'S DECISION CORRECTLY APPLIED EXISTING TAKING DOCTRINE AND IS NOT IN CONFLICT WITH THE RULINGS OF THIS COURT OR LOWER COURTS

A. The California Permit Process Includes Both an Administrative Process and an Expedited Judicial Review Process

The "California permit process includes both administrative and judicial review of any conditions to which the landowner objects." *Hensler* v. *City of Glendale*, 8 Cal.4th 1, 17, 32 Cal.Rptr.2d 244, 255, 876 P.2d 1043, 1054 (1994), *cert.denied*, 513 U.S. 1184 (1995). This integrated

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2. Landgate does not mention the Bogarts by name once in its 30-page petition. It may be inferred that Landgate made a tactical decision to avoid any association with Peter Bogart. See *Ojavan Investors, Inc.* v. *California Coastal Commission*, 54 Cal.App.4th 373, 62 Cal.Rptr.2d 803), *cert. denied*, __ U.S. __, 118 S.Ct. 601, 139 L.Ed. 886 (1997) (affirming award of over $9.5 million in civil penalties against Bogart and Bogart-owned entities for illegal land sales in violation of the Coastal Act).

administrative/judicial process is an expeditious one, especially where the Coastal Act is involved. A public hearing must be held within 49 days after an application is accepted for filing, Cal.Pub.Resources Code, § 30621, and the Commission must act upon an application within 21 days after the hearing is closed, *id.* 30622. Any person seeking review of a Commission decision must file a petition for writ of administrative mandate under California Code of Civil Procedure section 1094.5 within 60 days after the decision. Cal.Pub.Resources Code, § 30801. Administrative mandate proceedings may be heard on a law and motion calendar once the administrative record is prepared. See Cal.Code Civ.Proc., § 1094.

B. The California Supreme Court Correctly Applied the Principle That Normal Delay in the Permit Process Is Noncompensable

The California Supreme Court found that the Commission could not make its final determination of use until the legality of the lot on which Landgate proposed to build was resolved. Although the Commission's erroneous assertion of permit jurisdiction over the lot line reconfiguration may have delayed development, the delay caused by judicial resolution of the lot's legality was a "normal delay" in the permitting process and not a temporary taking for which *First English* required compensation. In reaching this conclusion, the California Supreme Court did not create a new legal principle. This Court itself in *First English* recognized that "quite different questions . . . would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like" than those presented by the outright development ban alleged in *First English*. *First English*, 484 U.S at 321. The conclusion that temporary hardships during the permit process are noncompensable is compelled by *Riverside Bayview Homes*—if the imposition of a permit requirement is not a taking, neither is the normal delay that

often occurs during the decisionmaking process.

The California Supreme Court correctly determined that the delay in approving the Landgate application was normal permit delay within the contemplation of *First English*. The Commission faced a threshold boundary line question: were the boundaries of the Landgate property those that existed before or after the lot line reconfiguration? The Commission could not make an informed decision—it could not make a *final* decision—about where and how the proposed development could be sited until it knew the location of the boundaries of the lot. This is the kind of complex question that often arises when agencies are confronted with interpreting statutes and policies, see, e.g., Pet.App. at 33a-35a, and the permit process in this case had to be delayed because only a court could provide a definitive legal answer about the lot's legality. Once the court of appeal determined that the Commission could not require a permit for the lot reconfiguration and that it must recognize the new boundaries, the Commission was able to make a final use determination. In these circumstances the California Supreme Court properly characterized the delay encountered by Landgate during the judicial resolution of the lot's legality as one of those temporary hardships inherent in a permitting process and not the categorical denial of all use.

The California Supreme Court's analysis is consistent with that of courts throughout the country that have been confronted with similar issues. The lower courts uniformly have agreed that the delay encountered during the permit process is noncompensable, even when delay is caused by an agency error during the permitting process and even when judicial intervention is necessary to correct the mistake. E.g., *Tabb Lakes, Ltd.* v. *United States*, 10 F.3d 796, 800-803 (Fed.Cir.1993) (no taking even though Corps' erroneous assertion of jurisdiction "effectively stopped [the plaintiff's] development" of property until courts corrected the mistake); *Jacobi* v. *City of Miami Beach*, 678 So.2d 1365 (Fla.Pet.App. 1996) (no taking or due process violation where land use agency

improperly denied a landowner's application to reconfigure two lots even though judicial intervention was required to correct the error); *Smith* v. *Town of Wolfeboro*, 615 A.2d 1252, 1257 (N.H. 1992) (erroneous denial of permit based on agency's misunderstanding of lot's legality not a taking, finding that judicial correction of errors is part of the decisionmaking process); *Cannone* v. *Noey*, 867 P.2d 797 (Alaska 1994) (delay caused by erroneous rejection of wastewater treatment plans not a taking, even though judicial intervention required to correct error); *Steinbergh* v. *City of Cambridge*, 604 N.E.2d 1269, 1275 (Mass.1992), *cert. denied*, 508 U.S. 909 (1993) (no taking despite delay caused by judicial review of mistaken legal interpretation); *Lujan Home Builders, Inc.* v. *Orangetown*, 568 N.Y.S.2d 850, 851 (N.Y.Sup.1991) (no taking despite erroneous decision because "delay in securing judicial relief" was part of the decisionmaking process).

The California Supreme Court correctly determined that the delay resulting from judicial resolution of the legality of the Landgate lot was part of the normal delay inherent in a permitting process and not a final definitive decision that categorically denied the use of property.

C. The California Supreme Court's Decision Does Not Conflict With the Decisions of This Court or the Lower Courts

The California Supreme Court's conclusion that normal permit delay may include judicial review of an agency's resolution of preliminary permit issues is not in conflict with either the decisions of this Court or those of the lower courts.

1. There Is No Conflict With the Decisions of the Lower Courts

The *Landgate* decision does not conflict with the decisions of other lower courts. Federal and state courts throughout the country have agreed that normal permit delay is noncompensable, even when the agency has erred in its

resolution of a preliminary issue and even when judicial review is required to correct it. See pp. 11-12 *supra*. Landgate does not cite a single lower court authority to support its view that the normal permit process may never include judicial review of preliminary permit issues. Nor does Landgate cite a single lower court authority that supports its view that the delay in use caused by an agency's interim mistake during the permit process constitutes a per se taking. Finally, Landgate does not cite a single authority that found a taking on a remotely similar set of facts.[3]

2. There Is No Conflict With the Decisions of This Court.

Landgate asserts that the *Landgate* decision conflicts with *First English* because the *Landgate* decision treats judicial resolution of preliminary permit issues as part of the normal permit process. *First English* recognized the difference between normal permit delays and actual regulatory takings, see pp. 10-11 *supra*, and did not hold or imply that normal permit delay may not include judicial review of interim permit decisions. Landgate concedes as much when it states that *First English* "did not attempt to define the phrase 'normal delays.'" Landgate Pet. at 13. The California Supreme Court's application of the normal permit delay principle

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3. Landgate relegates to a footnote its suggestion that "these questions have divided the lower courts." Landgate Pet. at 9, n. 7. Of the two cases cited by Landgate in which a taking was found, neither *City of Petersburg* v. *Bowen*, 675 So.2d 626 (Fla. 1996), nor *Steel* v. *Cape Corporation*, 677 A.2d 634 (Md. Ct. Spec. App. 1996), involved the issue whether permit delay caused by an interim land use error requiring judicial review constitutes a temporary taking. The taking discussion in a California court of appeal decision, *Healing* v. *California Coastal Commission*, 22 Cal.App.4th 1158, 27 Cal.Rptr.2d 758 (1994), was dicta because the case involved the procedure for litigating takings claims and, if inconsistent, must yield to the California Supreme Court's decision in *Landgate*.

therefore did not conflict with *First English*.

Landgate also asserts that the California Supreme Court's decision conflicts with *First English* because it denies compensation where there has been a temporary taking. Landgate Pet. at 14-16. *First English*, however, only provides that, *if* there has been a taking, government must pay compensation between the time of the taking and the time that the offending regulation is rescinded. Because there was no taking in this case, the *First English* compensation rule never comes into play. Pet.App. at 25a-35a.[4]

Nor does the California Supreme Court's decision "vitiate" *Lucas*, as Landgate argues. Landgate Pet. at 16-17. Landgate's argument is based on the faulty assumption that any delay in use of vacant property resulting from government error during the permitting process necessarily equates to a categorical denial of use under *Lucas*. *Lucas* understood that the situations in which government truly denies all economically viable use are "relatively rare" and "extraordinary," see *id.* at pp. 1016-1017; they involve situations where an agency—at the end of the regulatory process—makes an ultimate determination of use decision that precludes use and renders property "valueless." *Lucas* never suggested, much less held, that every delay in the use of vacant property caused by an agency mistake during the permit process constitutes the categorical taking of property.

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4. Landgate argues that the California Supreme Court erred because, in Landgate's view, it adopted the dissenting opinion of Justice Stevens in *First English*. Landgate Pet. at 21-24. The California Supreme Court did not adopt Justice Stevens' dissent in *First English*; California Supreme Court accepted the majority view in *First English* that true temporary takings are compensable. Pet.App. at 13a. As to the much narrower issue involved here—whether delay during permit processing might constitute a taking—the Court in *First English* did not decide in what circumstances permit delay might constitute a taking and therefore did not address Justice Stevens' concern about the possible overbreadth of the majority decision.

Pet.App. at 27a-32a.

This case differs from *Lucas* in another important respect. In *Lucas* the South Carolina courts found that the taking claim was ripe and the State conceded that the property was valueless as a result of governmental action. *Lucas,* 505 U.S. at 1011, 1020, fn. 9. In contrast, the California Supreme Court found as a factual matter that the Commission's decision was not final and that the Commission contemplated some use on the property. Pet.App. at 28a-30a. In addition, the Commission has always disputed Landgate's claim that the regulatory delay constituted the denial of economically viable use of property. See pp. 16-17 *infra.* The Court in *Lucas* indicated that it would have accepted a finding of the South Carolina's Supreme Court that the case was not ripe for review, *Lucas*, 505 U.S. at 1011, and the Commission requests here that the Court honor the California Supreme Court's finding that the Commission's decision was not a final determination of use.

Landgate also contends that the California Supreme Court's decision conflicts with *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Landgate Pet. at 24-26. Landgate's resort to *Williamson County* is self-defeating. In *Williamson County* the Court found that, after a seven-year regulatory process, the plaintiff's taking claim still was not ripe because the plaintiff had yet not obtained a "final, definitive position" on what use might be made of the property. *Williamson County* recognizes that, as in this case, agencies often "deny" or delay development in the course of the regulatory process without reaching a truly "final" decision. Indeed, *Williamson County* recognizes that, except in the rarest cases, a taking claimant must make two or more applications before an agency can provide its final view on a proposed use. See also *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340, 348 (1986).

In this case the California Supreme Court properly determined that the Commission had not and could not make

a final, definitive determination of use until the courts had established the legality of the lot on which Landgate proposed to build. Landgate's finality argument reduces to little more than a disagreement with the California Supreme Court's fact-specific finding that the Commission's decision was not a final determination of use. That kind of disagreement does not merit this Court's review. See *Lucas*, 505 U.S. at 1011.

In summary, the California Supreme Court's rejection of Landgate's taking claim does not conflict with the decisions of this Court or the lower courts.[5]

D. None of the Other Reasons Offered by Landgate Has Merit

Landgate offers a number of miscellaneous reasons why the Court should accept this case. None are meritorious.

First, Landgate asserts that "there is no dispute that the Commission's erroneous decision denied it 'all economically beneficial or productive use'" of its property. E.g, Landgate Pet. at 27. This assertion is grossly in error. It is based on Landgate's flawed assumption that every delay in use during the permit process equates to the categorical denial of all economically viable use, and the Commission has always disputed that its actions effected a categorical taking. Moreover, Landgate did not raise this as a factual issue in its separate statement of undisputed material facts that it filed with its summary adjudication motion, nor did it present any evidence with its motion that the Commission's action prevented the use or affected the value of the property. 3 CT

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5. The Commission's amici curiae argued before the California Supreme Court that there was a separate basis for rejecting the taking claim. There is no taking where the agency has no authority to perform the act on which the taking claim is based, such as the Commission's erroneous assertion of permit jurisdiction. See, e.g., *Regional Rail Reorganization Cases*, 419 U.S. 102, 127, n. 16 (1974); *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327, 330 (1922).

512. California summary judgment law prohibits consideration of factual issues and evidence that were not identified in a party's separate statement of facts. E.g., *Ojavan Investors, Inc., supra,* 54 Cal.App.4th 373, 390-391, 62 Cal.Rptr.2d 803, 813; *United Community Church* v. *Garcin*, 231 Cal.App.3d 327, 282 Cal.Rptr.2d 368, 373-5 (1991). Thus, there is no support whatsoever in the summary adjudication record for Landgate's current assertion that it was denied all economically viable use of property.[6]

Second, Landgate contends that the California Supreme Court's decision would cause multiple denials and allow land use agencies to "repeatedly deny development permit applications on illegal, improper or pretextual grounds . . . ." Landgate Pet. at 17. That, of course, was not the case here. The Commission's interpretation of its permit authority, even if erroneous, was neither unreasonable nor a pretext to deny all use, Pet.App. at 24a-25a, 31a, and the Commission promptly approved the development once the jurisdictional issue was resolved. As to Landgate's suggestion that other agencies will be encouraged to abuse the permit process by denying development for "pretextual" reasons, the *Landgate* decision specifically forbids an agency from fabricating a dispute or arbitrarily imposing conditions to discourage

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6. Lechuza's separate statement only declared that "The Court of Appeal found that 'rejecting the lot configuration results in Landgate's being denied any use of its property,'" citing only dicta in the court of appeal's unpublished mandate decision as supporting "evidence." 2 CT 263. The Commission disputed this statement, 3 CT 518, and the trial court did not rely on it in granting summary adjudication on the taking issue. 4 CT 809. Thus, having failed to identify the denial of economically viable use as an undisputed issue of material fact and having failed to provide any supporting evidence, Landgate is barred by California law from arguing that it established that it was denied economically viable use at the time of the motion granting summary adjudication on takings liability. See *North Coast Business Park* v. *Mielsen Construction Co.*, 17 Cal.App.4th 22, 30-32, 21 Cal.Rptr.2d 104, 109-110 (1993).

development. *Id.*[7]

Third, Landgate argues that the California Supreme Court's decision allows inquiry into the public interest and thereby fashions an exception to the categorical taking standard announced in *Lucas*. Landgate Pet. at 27-28. This seriously misinterprets the opinion. The California Supreme Court considered whether the Commission's actions advanced a legitimate public interest in response to the court of appeal's subjective evaluation of the Commission's intent. Pet.App. at 20a-25a. The California Supreme Court found that, from an objective standpoint, the Commission's action was based on legitimate concerns about the project's impacts, and was not formalistic or pretextual. *Id.* As previously discussed, the *Landgate* decision is entirely consistent with *Lucas*. Pet.App. at 26a-29a; see pp. 14-15 *supra*.[8]

Fourth, Landgate criticizes the California Supreme Court's consideration of an agency's bad faith as a "strawman." Landgate Pet. at 6, fn. 6. The California Supreme Court's decision allows a limited inquiry into an agency's motives in

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7. As of the date of this opposition brief, no reported decision has relied on the *Landgate* opinion. Landgate's reference to the California Supreme Court's remand of *Buckley* v. *California Coastal Commission*, 58 Cal.App.4th 460, 68 Cal.Rptr.2d 146, *mod.* 59 Cal.App.4th 39a, __ Cal.Rptr.2d __, *rev. granted*, 72 Cal. Rptr.2d 98, 951 P.2d 841 (1998), *trans'd*, 1998 Cal.LEXIS 4530 (1998), erroneously suggests that the California Supreme Court required the court of appeal to reconsider a finding that the Commission had engaged in a taking. Landgate Pet. at 12. In fact, the court of appeal in *Buckley* previously found that the Commission had *not* engaged in a taking.

8. At least one recent Supreme Court decision has questioned the propriety of using the "substantially advance a legitimate government interest" formulation in evaluating a regulatory taking. See *Eastern Enterprises* v. *Apfel*, __ U.S.__, 118 S.Ct. 2131 (1998) (Kennedy, J., concurring and dissenting). That, however, would not undermine the California Supreme Court's conclusion that the court of appeal's taking analysis unduly focused on the Commission's alleged subjective motivation.

order to *protect* landowners, because an agency may not claim that its action constitutes "normal delay" when in fact the agency's actions are taken in bad faith and in effect constitute a final denial of all use. Pet.App. at 24a-25a, 31a.

Finally, Landgate contends that the Court should accept review because of the alleged hostility of the California courts towards the taking doctrine. Landgate Pet. at 20-21. This attack on the California judiciary does not merit a serious response.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of the
State of California
RODERICK E. WALSTON
Chief Assistant Attorney General
RICHARD M. FRANK
Assistant Attorney General
PETER H. KAUFMAN
Deputy Attorney General
JOSEPH BARBIERI*
Deputy Attorney General
*Counsel of Record
2101 Webster Street, 12th Floor
Oakland, California 94612-3049
Telephone: (510) 286-3822
Counsel for Respondent

August 1998

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9. For an independent review of the California Supreme Court's recent decisions, see Uelmen, *Playing Center*, California Lawyer, July 1998 at 45.

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No. 98-183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LANDGATE, INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

KENNETH B. BLEY
(Counsel of Record)
COX, CASTLE & NICHOLSON LLP
2049 Century Park East
28th Floor
Los Angeles, California 90067
(310) 284-2231

[ADDITIONAL COUNSEL LISTED INSIDE FRONT COVER]

Washington, D.C. • THIEL PRESS • (202) 328-3296

28 pp

MARY DICRESCENZO
THE NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0250

NICK CAMMAROTA
THE BUILDING INDUSTRY
LEGAL DEFENSE FOUNDATION
1330 South Valley Vista Drive
Diamond Bar, California 91765
(909) 396-9993

Attorneys for Amici Curiae,
The National Association of
Home Builders and The
Building Industry Legal
Defense Foundation.

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In The

Supreme Court of the United States

October Term, 1998

No. 98-183

LANDGATE, INC.

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

The National Association of Home Builders ("NAHB") and the Building Industry Legal Defense ("BILD") Foundation have received the parties' written consent to file this brief as *amicus curiae* in support of the petitioner and have filed the letters of consent with the Clerk of the Court.[1]

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[1] No counsel for either party authored any part of this brief. No person or entity other than the NAHB and the BILD Foundation made any monetary contribution to the preparation of submission of this brief.

THE INTERESTS OF THE AMICI CURIAE ARISE FROM THEIR MEMBERS' CONCERNS AS TO THEIR ABILITY TO OBTAIN JUST COMPENSATION WHEN GOVERNMENTAL ACTION HAS DEPRIVED THEM OF ALL VIABLE USE OF THEIR LAND FOR SOME PERIOD OF TIME

The NAHB represents over 195,000 builder and associate members throughout the United States, over 5300 of whom are in California. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the remedy available to its members when, as in the case at bar, governmental action has deprived them of all viable economic use of their land for some period of time.

The NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the landowner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)[2], and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

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[2] The Court's opinion cited the NAHB's brief.

The BILD Foundation is a wholly owned subsidiary of the Building Industry Association of Southern California, a constituent part of the NAHB, whose 1,600 members include a significant number of residential developers and associate businesses that take part in building 70% of all new residential units annually in the Southern California region.

The NAHB and the BILD Foundation submit their *amici curiae* brief in support of the petitioner in the present case to convince the Court to grant its writ of certiorari because, at bottom, the question is whether the courts of California are required to follow the law laid down by this Court or whether they are free to go their own way and hold that the commands of the Fifth and Fourteenth Amendments of the federal Constitution do not apply in California.

SUMMARY OF THE ARGUMENT

This Court has spoken on a number of issues concerning regulatory takings. The courts of California have seen fit to disregard many of this Court's pronouncements.

This Court has held that a claim that regulation has taken land is ripe when the governmental entity imposing the regulation has reached a final decision concerning the application of the regulation; the courts of California have held that there is no final decision until a court has determined the validity of the regulation.

This Court has held that a per se taking has occurred when regulation deprives the owner of land all viable economic use of that land; the courts of California have held that the legitimacy of the reason for the regulation must be considered.

This Court has held that the ability to use land is a right; the courts of California have held that it is a privilege.

This Court has held that the ownership and use of land is a right protected by the substantive component of the Due Process Clause; the courts of California have held that there is no protected right where a discretionary approval is involved.

This Court has held that a taking of land occurs when governmental action does not substantially advance a legitimate state interest or when it deprives a landowner of viable economic use of his or her land; the courts of California cannot agree on what that means.

California has walled itself off from the dictates of t his Court and the rest of the nation when it comes to land use. Unless this Court grants its writ of certiorari and reverses the California Supreme Court's decision in *Landgate, Inc. v. California Coastal Commission*, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188 (1998), landowners in California will continue to be deprived of rights recognized by this Court and enjoyed by landowners in every other state.

ARGUMENT

I. THE REGULATORY PROCESS DOES NOT INCLUDE JUDICIAL REVIEW

A. *The United States Supreme Court*

> "As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the governmental entity charged with implementing the regulation has reached a final decision regarding the application of the regulations to the property at issue.
>
> * * *
>
> "...While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities, respondent would not be required to resort to those procedures before bringing its §1983 action because those procedures clearly are remedial." *Williamson County, supra,* 473 U.S. at 186 and 193 [citations omitted].

B. *The Courts Of California*

The California Supreme Court did not see fit to refer to *Williamson County* on the question of whether judicial review was part of the regulatory process in its opinion in *Landgate.* Instead, it sidestepped the issue entirely.

> "Nothing in *First English [Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)], however, is inconsistent with the recognition that a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, and the fact that a landowner must resort to such a determination does not constitute a per se temporary taking." *Landgate, supra,* 17 Cal.4th at 1030, 73 Cal.Rptr.2d at 841, 953 P.2d at 1203 [italics in the original].

II. THE PRESENCE OF A LEGITIMATE GOVERNMENTAL PURPOSE DOES NOT PROTECT A GOVERNMENTAL ENTITY FROM LIABILITY WHEN REGULATION DEPRIVES LAND OF ALL VIABLE ECONOMIC USE FOR SOME PERIOD OF TIME

A. *The United States Supreme Court*

This Court has held that there are situations where governmental action can result in a taking without the application of any balancing test. After discussing the general need for "essentially ad hoc, factual inquiries" to determine when a taking has occurred, this Court stated:

> "We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. ...
>
> "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)(landowner did not take issue with the validity of South Carolina's Beachfront Management Act).

This recognition that the achievement of legitimate governmental interests may require going beyond the use of the police power alone is, of course, no more than a restatement of the general rule that the measure of just compensation is not what the government has gained but rather what the landowner has lost. *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1909).

B. *The Courts Of California*

The California Supreme Court completely rejected this Court's holding in *Lucas* and held that the courts of California are to consider the validity of interests to be served:

> "[G]overnment land use regulations and decisions ... which, despite their ultimately determined statutory defects,

are part of a reasonable regulatory process designed to advance legitimate government interests, are not takings of property under the Supreme Court's doctrine ..." *Landgate, supra,* 17 Cal.4th at 1021, 73 Cal.Rptr.2d at 850, 953 P.2d at 1197.

III. THE DEVELOPMENT OF LAND IS A RIGHT, SUBJECT TO REASONABLE REGULATION, AND NOT A PRIVILEGE

A. *The United States Supreme Court*

"But the right to build on one's own property - even though its exercise can be subjected to legitimate permitting requirements - cannot remotely be described as a governmental benefit. " *Nollan, supra,* 483 U.S. at 833, n.2.

B. *The Courts Of California*

"The dedication of land or the payment of fees is a condition precedent to development is voluntary in nature. Even though the developer cannot legally develop without satisfying the condition precedent, he voluntarily decides whether to develop or not to develop. **Development is a privilege not a right.**" *Trent Meredith, Inc. v. City of Oxnard,* 114 Cal.App.3d 317, 328, 170 Cal.Rptr. 685, 691 (1981)[emphasis added].

Of course, *Trent Meredith* was decided before this Court's decision in *Nollan*; unfortunately, that is irrelevant as far as the courts of California are concerned. See, *e.g.*, *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 893, 50 Cal.Rptr.2d 242, 268, 911 P.2d 429, 455, *cert. denied*, - U.S. -, 117 S.Ct. 299 (1996), and *Centex Real Estate Corp. v. City of Vallejo*, 19 Cal.App.4th 1358, 1363, 24 Cal.Rptr.2d 48, 51, (1993), both of which spoke of "the privilege of developing property."

IV. THE USE AND ENJOYMENT OF LAND IS A PROPERTY RIGHT PROTECTED BY THE CONSTITUTION

A. *The United States Supreme Court*

This Court has held that land is property within the meaning of the Fifth and Fourteenth Amendments and that the owner of land is entitled to their protection.

> "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)[citation omitted].

Nor is this a new idea.

> "The right of the [landowner] to devote its land to any legitimate use is property within the protection of the Constitution." *State of Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

B. *The Courts Of California*

The courts of California disagree; they hold that there can be no property interest protected by the Due Process Clause where there is discretion.

> "Any significant discretion conferred upon the local agency defeats the claim of a property interest." *Clark v. City of Hermosa Beach*, 48 Cal.App.4th 1152, 1180, 56 Cal.Rptr.2d 223, 240 (1996), *cert. denied*, - U.S. -, 117 S.Ct. 1430 (1997) (neither procedural nor substantive due process protection is available where a local agency wrongfully denied a discretionary land use approval).

V. A TAKING OCCURS WHEN GOVERNMENTAL ACTION FAILS TO ADVANCE A LEGITIMATE STATE INTEREST

A. *The United States Supreme Court*

In *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), this Court set the standard for determining when land use regulation took land:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land." [Citations omitted.]

The formulation in *Agins* does not stand alone; it has been repeatedly cited by the Court. See, *e.g.*, *Dolan, supra*, 512 U.S. at 386, *Lucas, supra*, 505 U.S. at 1016, *Nollan, supra*, 483 U.S. at 834, *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987), *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985), and *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981).

Further, this Court has made it clear that a violation of the first prong of the *Agins* test, standing by itself, can result in a taking of the land affected even though the regulation leaves value in the land. *Dolan, supra*, 512 U.S. at 385 n.6 ("Petitioner assuredly is able to derive *some* economic use from her property.")[emphasis in the original].

B. *The Courts Of California*

> "There are several problems with [the landowner's] attempt to show that, as a matter of law, a taking of property occurred here. First, we cannot accept [the landowner's] theory that satisfaction of one element of the *Agins* test (i.e., that there was an invalid regulation) is enough to establish a taking as a matter of law. In *Nollan, Lucas,* and *Dolan*, the United States Supreme Court's analysis of the taking issue inextricably linked both the regulation's validity and the question of whether an economically beneficial use of the property remained in light of the regulation. In light of later authority, *Agins* did not establish an 'either/or' type of test." *Del Oro*

Hills v. City of Oceanside, 31 Cal.App.4th 1060, 1079, 37 Cal.Rptr.2d 677, 690 (1995).[3]

VI. JUST COMPENSATION MUST BE PAID WHEN A REGULATION TAKES LAND FOR THE TIME THAT THE REGULATION REMAINS IN EFFECT

A. *The United States Supreme Court*

> "We merely hold that where the government's actions have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987).

This Court recognized that the result would be to limit the flexibility of local governments and to impose costs on local government which, in California, they had not had to bear before.

> "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of

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[3] In fairness to the courts of California, it should be noted that another court of appeal, in 152 *Valparaiso Associates v. City of Cotati*, 56 Cal. App. 4th 378, 385-386, 65 Cal.Rptr.2d 551, 555-556 (1997), disagreed with the statement in *Del Oro Hills*.

> municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." *First English, supra,* at 321.

B. *The Courts Of California*

The *Landgate* case before this Court is only the latest statement of the California Supreme Court that it does not intend to be bound by this Court's decision in *First English.* For example, in *Kavanau v. Santa Monica Rent Control Board,* 16 Cal.4th 761, 66 Cal.Rptr.2d 672, 941 P.2d 851 (1997), the California Supreme Court dealt with a case where the court of appeal had earlier held that the landlord's constitutional right had been violated, a holding that the California Supreme Court felt itself bound by. *Kavanau, supra,* 16 Cal.4th at 777-779, 66 Cal.Rptr.2d at 682, 941 P.2d at 861. The California Supreme Court held that the landlord was not entitled to damages; the only remedy that he was entitled to was the opportunity to charge higher rents in the future even though he would have to charge higher than market rents to make up for what he had lost. *Kavanau, supra,* 16 Cal.4th at 785, 66 Cal.Rptr.2d at 687, 941 P.2d at 866.

Quite simply the California Supreme Court's decisions are guided by a world view substantially different from that expressed by this Court in *First English.*

> "The disparity in resources between the federal government and local governmental entities both explains and justifies the state procedure. The likelihood that the impact of a federal regulatory statute may affect a taking of property of such value is to threaten the federal treasury with insolvency is remote. Congress has determined that providing a damage remedy for those cases in which a taking occurs will not cause undue hardship. Few local governments could afford the financial impact of a decision that a widely applicable zoning or regulatory ordinance brought about a taking of all affected property." *Hensler v. City of Glendale*, 8 Cal.4th 1, 18-19, 32 Cal.Rptr.2d 244, 255, 876 P.2d 1043, 1054 (1994) [footnote omitted].

This is, of course, a reprise of what the California Supreme Court said almost 20 years ago in *Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). In *Agins*, the California Supreme Court, after quoting from a number of law review articles listing a parade of horribles which would result if a court were ever to hold that a land use regulation which went too far could result in inverse condemnation and the payment of just compensation, concluded:

> "In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which adheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." *Agins, supra*, 24 Cal.3d at 276-277, 157 Cal.Rptr. at 378, 598 P.2d at 31.

CONCLUSION

The NAHB and the BILD Foundation do not stand alone in believing that the courts of California have missed the mark. Some of the most respected observers of the land use scene have frequently noted the same thing.

> "The striking feature of California zoning law is that the courts of that state have quite consistently been far rougher on the property rights of developers than those in any other state. In a fairly long series of cases, the California court has upheld restrictions on property right which would not be upheld in many other states, and (in some circumstances) probably not in any other." 1 Williams, *American Planning Law*, § 6.03, *Differences Between The States - California*, at 184 (1988 rev.).

> "In California the property owner has virtually no fundamental rights to use land under the state constitution, at least as interpreted by the state supreme court. The court in the 1980s supported the view that the use of one's land is a privilege, not a right, and that private use may be conditioned on favors toward the state. The California court is the home of hierarchy in which rights are tied to roles and experts or those claiming to speak for the groups prescribe the autonomy of individuals. The attachment of public service conditions to land is evocative of the feudal emphasis on status and obligation, and the heavily decentralized regulatory process can make California communities akin to feudal fiefdoms. In the state of California, the supreme court implied that the king could do no wrong, although in a democracy the king is more likely to be a planning and zoning commission than a monarch in robes." Coyle, *Property Rights and the Constitution*, Ch. 5, *California: Where Deference Reigns Supreme*, 118 (1993)[footnote omitted].

Two of America's best known land use lawyers, Richard Babcock and Charles Siemon, discussed the treatment of a landowner by the California Coastal Commission - the present respondent - in their book, *The Zoning Game Revisited* (1985).

"And then there were many procedural practices of the Commission that outraged many lawyers, as they should have: no cross-examination; a limited time to speak (ten minutes); and commissioners leaving the room or turning their backs when the lotowners' lawyers spoke. But anyone who practices public law in California should know better than to expect the California courts to be sympathetic with procedural due process protests when they challenge governmental practices. The Fourteenth Amendment appears to be nonexistent.

* * *

"Finally, there are the unfortunate persons caught in the squeeze for almost ten years, watching interest rates and inflation soar and denied the right to build. It is reminiscent of San Antonio and the absolute moratorium. But there's a difference: that was Texas, and this story took place in California. In the former jurisdiction, the courts would have thrown it out with no second thought. In California, the courts have elevated governmental arrogance to a fine art.

* * *

> ". . . What *can* one say about the California courts other than that one has to be a madman to challenge a governmental regulation in that bizarre jurisdiction?" *Babcock & Siemon, supra,* at 251, 253 and 257 [citation omitted; italics in the original.]

Babcock & Siemon summed up the relationship between developers who own land in California and the protection of their rights to use their land in one sentence:

> "Practitioners in other states have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat." *Babcock & Siemon, supra,* at 293.

The treatment that Landgate received at the hands of the California Supreme Court is, unfortunately, not untypical and it is likely to continue unless, and until, this Court makes it clear that it meant what it had said in previous cases:

- The ownership of land means that the landowner has a property right, protected by the Fifth and Fourteenth Amendments to the federal Constitution, to use that land subject, of course, to reasonable regulation.

- When a landowner is deprived of all viable economic use of his or her land for some period of time, the federal Constitution mandates the payment of just compensation for that period.

- The question is not whether the local government meant to sterilize the land for some period of time but whether it actually did so; there is no good-hearted, empty-headed defense (local government's plea that it didn't mean to do it; that it was all a mistake).

- The Fifth and Fourteenth Amendments to the federal Constitution protect landowners even when their land is located in California.

The NAHB and the BILD Foundation respectfully request that this Court grant Landgate's petition for writ of certiorari.

Respectfully submitted,

MARY DICRESCENZO
The NATIONAL ASSOCIATION
OF HOME BUILDERS

NICK CAMMAROTA
BUILDING INDUSTRY LEGAL
DEFENSE FOUNDATION

KENNETH B. BLEY*
COX, CASTLE &
NICHOLSON LLP
attorneys for AMICI CURIAE
The NATIONAL
ASSOCIATION OF HOME
BUILDERS and THE
BUILDING INDUSTRY
LEGAL FOUNDATION

*Counsel of Record

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October Term, 1997

LANDGATE, INC.,
Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION, LECHUZA VILLAS WEST, AND HORWATH ASSOCIATES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ERIC GRANT
Counsel of Record
JAMES S. BURLING
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE

For 24 years, amicus Pacific Legal Foundation (PLF) has been litigating in support of the right of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on two occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997). PLF has participated as an amicus curiae in virtually every major real property takings case heard by this Court in the past two decades. PLF attorneys are also counsel of record in no fewer than four pending petitions for writ of certiorari seeking this Court's review of erroneous interpretations of the Takings Clause.[1]

One of these petitions was filed on behalf of amicus Lechuza Villas West (Lechuza), a California limited partnership whose beachfront lots respondent California Coastal Commission has forced to remain economically idle for seven years. *See Lechuza Villas West v. California Coastal Commission*, No. 98-30 (filed June 30, 1998). Like petitioner in the present case, Lechuza was the victim of a ruling by a court determined to escape the compensation mandate of *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Like the court below, the state court in Lechuza's case held that Lechuza's takings claim could not possibly ripen before Lechuza had established—by a judicial decree in separate litigation against the Coastal Commission—that it had a right to develop its land under state law. *See Lechuza Villas*

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[1] Pursuant to Rule 37.3(a), all parties have consented to the filing of this amicus curiae brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution to the preparation or submission of this brief.

West v. California Coastal Commission, 70 Cal. Rptr. 2d 399, 410-11 (Ct. App. 1997). Like the court below, therefore, the court in Lechuza's case held that Lechuza could not recover damages for a temporary taking *even if* the Coastal Commission had decided that Lechuza could not build on its property, *even if* that decision had deprived the property of all economically viable use, and *even if* state law did not justify the agency's decision.

Finally, amicus Horwath Associates (Horwath) is a California partnership whose rental property was damaged by government action (refusal to approve requested rent increases) that failed to substantially advance any legitimate state interest. *See Horwath v. City of East Palo Alto*, No. 376167, slip op. at 5-6 (Cal. Super. Ct. San Mateo Cty. June 13, 1994) ("The City and its Board further acknowledge that neither at the time nor in this trial has any good cause been shown pursuant to either the Ordinance or the Regulation for any delay beyond the mandatory time limits . . . ."). Despite this failure, the California Court of Appeal ruled that Horwath could not recover damages for a temporary taking during the period spent overturning the government's action in litigation. Like the court below, the court of appeal in Horwath's case concluded that the period during which the taking was effective constituted merely "a delay attributable to the normal workings of governmental and legal processes, a situation *First* [*English*] declined to address." *Horwath Associates v. City of East Palo Alto*, No. A067695, slip op. at 10 (Cal. Ct. App. Apr. 30, 1996). Although the California Supreme Court originally granted review in Horwath's case, review was dismissed once the *Landgate* decision was handed down. Represented by PLF, Horwath intends to file a petition for certiorari seeking review of the court of appeal's decision on or before October 6, 1998.

ARGUMENT

The petition has already explained how the decision below conflicts with this Court's temporary takings jurisprudence. The following brief demonstrates how the decision also conflicts with the Court's ripeness jurisprudence, with the axiom of takings law that the public should bear the burdens of regulation designed to benefit the public, and with the decisions of two other state courts of last resort.

I

THE CONFLICT WITH *WILLIAMSON COUNTY* AND OTHER RIPENESS DECISIONS

In *First English*, the lower court had held that "a landowner who claims that his property has been 'taken' by a land-use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a 'taking' of his property." 482 U.S. at 306-07. This Court explicitly "disagree[d]" with that holding, concluding that the Takings Clause "would require compensation for that period." *Id.* at 307. The Court went on to hold that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321. The Court emphasized that mere invalidation of the regulatory action "without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." *Id.* at 322.

In the present case, it cannot be disputed that the Coastal Commission's steadfast refusal to approve the application of petitioner Landgate, Inc. (Landgate) to build a home on its lot deprived that property of all economically viable use. As in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1007 (1992), that refusal "had the direct effect of barring [Landgate] from erecting any permanent habitable structures on [its property]." Indeed, the trial court found that

> Landgate has been deprived, at least temporarily, of all economically viable or productive use of its property insofar as Landgate, at least temporarily, could not legally obtain any valid permits or approvals to construct any project on its property as a result of the Commission's actions.

Appendix to Petition for a Writ of Certiorari (Pet. App) at 101a. The court of appeal affirmed this finding, observing that "[t]he Commission does not argue that a viable use of the land remained after the permit denial." *Id.* at 69a. Even the California Supreme Court conceded this point (if obliquely) when it observed that "each time there is a delay in the development process"—such as the two-year delay occasioned by the Coastal Commission's refusal to grant Landgate a development permit —"the delay may be said to temporarily deprive the developer of undeveloped property of use of that property." *Id.* at 26a.

Given the rule in *First English* and given the fact of Landgate's loss of economically viable use, it would seem a fairly straightforward conclusion that Landgate is entitled to "payment of fair value for the use of the property during" the two years that its property was forced to remain economically idle. *First English*, 482 U.S. at 322. How did the *Landgate* majority escape from this conclusion? Certainly not by asserting boldly that *any* delays occasioned by a judicial determination of a land-use restriction's validity merely constitute "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," which *First English* arguably excluded from the compensation mandate. 482 U.S. at 321. No, such an assertion would have been too obvious a departure from the text of *First English* and too obvious an adoption of the *First English* dissent—a point rightly emphasized by the *Landgate* dissenters and by the petition. *See* Pet. App. at 38a (Chin, J., dissenting); *id.* at 48a (Brown, J., dissenting); Pet. at 21-24. Rather, in the end, the *Landgate* majority "distinguished" this Court's decision on grounds of *finality*, reasoning thus:

> *First English* merely stands for the proposition that once a government action *finally denies* all economically viable use of property, the fact that the government later rescinds that action after a judicial proceeding does not relieve it of its duty to pay compensation.

Id. at 32a (emphasis added).

The notion of finality that was conceived by the California Supreme Court in *Landgate* is fundamentally flawed. Not only is that notion irreconcilably in conflict with this Court's ripeness jurisprudence, it will usher in a legal regime in which the principle of compensation for temporary takings is rendered wholly theoretical.

After noting generally at the beginning of its analysis that this Court "has emphasized that the question whether property has been taken is not ripe for decision until a government agency has rendered a final decision on the use to which the property in question may be put," *id.* at 14a (citing *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190-91 (1985)), the *Landgate* majority sharpened its focus in Part II.C of its opinion. In setting forth "the critical difference between this case and *Lucas* and *First English*," the court opined that "an essential prerequisite to the assertion of a takings claim is 'a final and authoritative determination of the type and intensity of development legally permitted on the subject property.'" *Id.* at 28a (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)). The immediately following sentence set forth the court's conception of a final determination:

> If a would-be developer fails to meet legitimate conditions for obtaining a development permit, then a government agency's refusal to issue such a permit would by no means be a "final and authoritative determination of the intensity of development legally

> permitted on the subject property," but merely a *conditional denial*.

Id. at 28a-29a (emphasis added).

This proposition has a superficial plausibility, conjuring up a would-be developer who fails to submit any development plan at all, *cf., e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (noting that the property owners had "not submitted a plan for development of their property as the [zoning] ordinances permit"), or who fails to submit a development plan that provides for sufficient street access, sewer service, police protection, and water service, *cf., e.g., MacDonald*, 477 U.S. at 343. But as used by the California Supreme Court, the phrase "fails to meet legitimate conditions for obtaining a development permit" has an entirely different meaning, as revealed by the court's application of that principle to the facts of the present case.

In rejecting Landgate's application to build a home on its lot, reasoned the court, the Coastal Commission did not act with finality; rather, the agency's "rejection of Landgate's development was at most *conditional*." Pet. App. at 29a (emphasis added). What made the Coastal Commission's rejection conditional rather than final? It could not have been that Landgate "fail[ed] to meet legitimate conditions for obtaining a development permit" as those words are ordinarily used. If the condition in this case was that of proposing development on a legally configured lot, then Landgate surely did not *fail* to meet it. In a prior phase of the present case, the court of appeal held that "Landgate's predecessor owned two valid, properly recorded lots" resulting from a lot reconfiguration done by Los Angeles County and that the Coastal Commission lacked authority to "reject the reconfiguration as new 'development' inconsistent with the [Coastal] Act." *Id.* at 96a. The state supreme court accepted that holding as the law of the case. *See id.* at 24a n.6. If instead the condition in this case was that of obtaining the agency's permission to reconfigure Landgate's lot, then that

condition was not *legitimate*. To rephrase the previous point, it has been determined by the California courts that "the Commission had no jurisdiction to deny [Landgate's development] permit on that ground." *Id.* at 64a.

What, then, did the *Landgate* majority actually mean by "fails to meet legitimate conditions for obtaining a development permit"? The answer is found in the court's conclusion that the Coastal Commission "could not be said to have reached a final and authoritative determination of the development on Landgate's lot *until after the dispute about the legality of the lot had been resolved*." *Id.* at 31a (emphasis added); *accord id.* at 30a ("Or to put it another way, the Commission's denial of development on [some lot] is not a final decision on that development until the dispute over whether [the lot] legally existed was resolved."). Indeed, the court identified the existence of a dispute as "the difference between this case and *First English*," explaining thus:

> Here, there was a postponement of development pending resolution of a threshold issue of the development approval process—whether the lot was legal —and not a final decision denying development. In *First English*, on the other hand, . . . there was no *dispute about a threshold issue in the development approval process*, as there was in this case, that would be a legitimate basis for postponing approval of development.

Id. at 32a (emphasis added).

In the California Supreme Court's conception of finality, then, there can be no final decision, no final and authoritative determination by a land-use agency, so long as there exists a "dispute about a threshold issue in the development approval process." *Id.* Moreover—and this is critical—until that dispute is resolved by a *court*, an application for development has not been finally denied, only conditionally denied or postponed.

Accordingly, even a property owner who is categorically prohibited from making any use of his land suffers no compensable taking (temporary or otherwise) if that prohibition results from an "impasse in the regulatory process that must be resolved through a judicial proceeding." *Id.* In other words, "a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, and the fact that a developer must resort to such a determination does not constitute a per se temporary taking." *Id.* at 32a-33a.

In short, the California Supreme Court created a category that it labeled "threshold issue[s] in the development process" or "preconditions to development" or "threshold development questions." *Id.* This category was undefined but nevertheless expansive, including *both* "procedural conditions and substantive requirements on development." *Id.* at 28a. If there arises a "dispute" or "impasse" between the land-use agency and the property owner regarding these questions or issues, it "must be resolved through a judicial proceeding" before there can be "a final decision denying development." *Id.* at 32a. This passive-voice formulation, however, hides the last, critical detail of the *Landgate* majority's scheme: the required "judicial determination" does not magically fall from the sky; rather, to obtain a final decision regarding the use of his property that will allow him to pursue a regulatory takings claim, "*a developer* must resort to such a proceeding." *Id.* at 32a-33a (emphasis added). In one sentence: *Landgate* held that as to some expansive category of development conditions imposed by a land-use agency, a property owner must affirmatively seek judicial review of the agency's position in order to obtain a final decision that renders the owner's takings claims ripe.

To state this holding is fairly to expose its error. Consider first *Williamson County*. In setting forth the finality requirement in that decision, the Court rejected the argument that the requirement was inconsistent with *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982), which held that an aggrieved

person need not "exhaust administrative remedies before bringing a § 1983 action." *Williamson County*, 473 U.S. at 192. The Court carefully explained why finality and exhaustion are "conceptually distinct": the former "is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury"; the latter, by contrast, "refers to administrative and *judicial procedures* by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." *Id.* at 192, 193 (emphasis added). The Court went on to illustrate the difference between the two concepts by "comparing the procedure for seeking a variance [from a land-use agency] with the procedures that, under *Patsy*, [the owner] would not be required to exhaust." *Id.* at 193. Observing that "the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities," the Court nevertheless explicitly held that the property owner "would ***not*** be required to resort to those procedures before bringing its § 1983 action, because those procedures are clearly remedial." *Id.* (emphasis added).

The contrast between *Williamson County* and the decision below could not be more clear: if this Court's decision was that a property owner "would ***not*** be required to resort to [judicial] procedures," the California Supreme Court's decision was that a property owner "***must*** resort to [a judicial] determination" in order to obtain a final and authoritative determination by the agency. Pet. App. at 33a (emphasis added). Thus, while the respondent in *Williamson County* was ***not*** required to "seek a declaratory judgment regarding the validity" of the land-use agency's disapproval of a subdivision plan in order to obtain a final decision from that agency, 473 U.S. at 193, Landgate ***was*** required to seek "a judicial determination of the validity" of the Coastal Commission's denial of a development permit in order to obtain a final decision from that agency. *Cf.* Pet. App. at 25a (rejecting Landgate's contention that there was a final decision

denying all economically viable use of its property "from the time the development permit was denied in February 1991 until the time it was approved in February 1993 after the lot line issue had been resolved by litigation").

Following *Williamson County*, the decision in *MacDonald* confirms the conflict between this Court's ripeness jurisprudence and the decision below. After having reiterated that a takings claim is ripe when "a court knows what use, if any, may be made of the property," the Court spoke to the very point at issue here: "A property owner is of course not required to resort to *piecemeal litigation* or otherwise unfair procedures in order to obtain this determination." *MacDonald*, 477 U.S. at 350 & n.7 (emphasis added); *accord id.* at 363 (Powell, J., joined by Burger, C.J., dissenting) (quoting this statement with approval). But "piecemeal litigation" is precisely what the California Supreme Court has endorsed. In the present case, the agency relented after only one round of "pre-finality" litigation. Yet while remaining entirely faithful to the decision below, the agency could have forced Landgate to sue it again and again. If the first round of litigation concerned "lot configuration," the second round could have concerned "compliance with the Subdivision Map Act," the third round "compliance with CEQA [California Environmental Quality Act]," and succeeding rounds any of myriad "other threshold questions that must be resolved before it can be determined whether a development should be permitted to proceed." Pet. App. at 33a; *see also id.* at 33a-34a (citing, *as merely exemplary*, 11 different instances of "threshold development questions").

If the decision below is inconsistent with this Court's ripeness jurisprudence, it also takes California law back to the pre-*First English* era for all practical purposes. While the *Landgate* opinion would appear to hold open the possibility that there are certain issues that do not qualify as "threshold" issues, certain conditions that do not count as "preconditions," that possibility is merely theoretical. As mentioned above, the kinds of issues

that fall within the *Landgate* rubric cover the spectrum, including both "procedural conditions and substantive requirements on development." Pet. App. at 28a. Indeed, as an example of a case involving "threshold development questions," *Landgate* cited *Bel Mar Estates v. California Coastal Commission*, 171 Cal. Rptr. 773 (Ct. App. 1981), describing it as a case in which the "Commission correctly construed [its] statutory authority to deny development." Pet. App. at 33a, 34a. The citation to *Bel Mar Estates* is telling, for that case involved simply the question whether "the grounds given by the commission for denying the application" for development "conform[ed] to the policy of the [Coastal Act]." 171 Cal. Rptr. at 775-76.

Yet if the question whether a proposed development conforms with the statute administered by the land-use agency is a "threshold" question, if the condition that such a development comply with the statute is a *pre*condition, then *every* question is a threshold question and *every* condition is a precondition. The notion of finality (or rather *non*-finality) conceived by the court below has no limits. Accordingly, to paraphrase *Lucas*, the concept of a threshold development question or a precondition to development "cannot be the basis for departing from [the] categorical rule that [temporary deprivations of all economically viable use] must be compensated. If it were, departure would virtually always be allowed." 505 U.S. at 1026.

Because the California Supreme Court has decided an important question of takings procedure in a way that conflicts with relevant decisions of this Court, review is warranted under Rule 10(c).

II

THE CONFLICT WITH THE PRINCIPLE THAT PUBLIC BURDENS SHOULD BE BORNE BY THE PUBLIC

In the lower court's own description, the Coastal Commission's refusal to allow Landgate to build a house on its lot was "a legally erroneous decision of a government agency during the development approval process resulting in delay." Pet. App. at 15a. The court conceded that, from Landgate's point of view, the delay resulting from this erroneous decision (or "regulatory mistake," *id.*) had an impact that was "identical" to the "denial of all feasible use." *Id.* at 26a. In general, the court further conceded, the delay resulting from a regulatory mistake "may be said to temporarily deprive the developer of undeveloped property of use of that property." *Id.* Notwithstanding these concessions, the *Landgate* majority heaped the burden of governmental mistakes onto property owners, holding that such mistakes are "part of the development approval process, and development delays that result therefrom may be imposed on the developer rather than the general taxpayer without violating the United States Constitution." *Id.* at 19a.

This allocation of burdens is fundamentally in conflict with the bedrock principle of takings law: "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English*, 482 U.S. at 318-19 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). It may well be that property owners must bear the burdens of obtaining a final *administrative* decision. In all fairness and justice, however, it is the public who should bear the burden of regulatory mistakes that must be corrected through *litigation*. After all, it is the public who presumably benefits from the "reasonable regulatory process designed to advance legitimate government interest," *Landgate*, Pet. App. at 18a,

which produced those mistakes in the first place. It is no excuse that regulatory mistakes are somehow inevitable given that "[t]he resolution of these cases often turns on the construction and application of complex statutory schemes." *Id.* at 33a. Again, it is the public—not the victimized property owners—who presumably benefits from the mistake-generating schemes; therefore, it is the public who ought to bear the burden when the resulting mistakes "temporarily deprive the developer of undeveloped property of use of that property" during the course of litigation overturning those mistakes. *Id.* at 26a.

This, we submit, is the teaching of *First English*. Back in *Williamson County*, this Court assigned property owners rather than the public much of the burden of obtaining permission to make economically viable use of their land by requiring them to spend considerable time and effort extracting a "final decision" from the administrative process. But in *MacDonald*, the Court set a limit, declaring that the burden on property owners "of course" did not extend so far as to require them "to resort to piecemeal litigation" to obtain this final decision. 477 U.S. at 350 n.7. *First English* confirmed this limit and made it more concrete: "invalidation of [a regulatory mistake] without payment of fair value for the use of the property during [the period spent overturning the mistake through litigation] would be a constitutionally insufficient remedy." 482 U.S. at 322. Once the property owner is forced to resort to the judicial process, the government's mistakes must be borne by the government. This is fairness and justice.

III

THE CONFLICT WITH OTHER STATE COURTS OF LAST RESORT

While the California Supreme Court's decision is arguably consistent with the decisions of some state courts of last resort, *see Landgate*, Pet. App. at 15a (citing cases), it is definitely in conflict with the decisions of two others.

A. Nebraska Supreme Court

In *Whitehead Oil Company v. City of Lincoln*, 515 N.W.2d 390 (Neb. 1994) (*Whitehead Oil II*), the company applied for a use permit to build and operate a service station and convenience store on its property consistent with the existing zoning. The city, "react[ing] to the arguably valid concerns of its citizens in the area," modified the property's zoning designation and denied the application as inconsistent with that designation. *Id.* at 678. That was in June of 1987. Nearly seven years later, after two trips through the Nebraska court system, the company succeeded in having the zoning change declared invalid under state law: the Nebraska Supreme Court concluded that "the city acted arbitrarily and capriciously in changing the zoning designation of the [company's] parcel"; the court "direct[ed] the district court to remand the matter to the city, ordering it to issue Whitehead Oil the permit it seeks." *Id.* at 678, 680.

Having ruled for the oil company on this state-law zoning issue, the Nebraska Supreme Court then considered the company's additional claims for "damages in inverse condemnation under both the U.S. and Nebraska Constitutions." *Whitehead Oil Company v. City of Lincoln*, 515 N.W.2d 401, 405 (Neb. 1994) (*Whitehead Oil III*) (companion case decided the same day as *Whitehead Oil II*). Those takings claims sought compensation in an amount equal to "the fair rental value of its property as a site for a convenience store . . . *from the date its use permit should have issued*," not from the date on which the city's actions were invalidated. *Id.* (emphasis added).

How would the California Supreme Court have treated these claims under the *Landgate* analysis? The answer is not at all difficult. To paraphrase *Landgate* only slightly: The city "could legitimately require" that any development of the company's property be consistent with all validly adopted zoning designations. *Landgate*, Pet. App. at 31a. Therefore, when the city determined that the company's development proposal was not consistent with the newly changed zoning, "it could legitimately litigate the [question of the zoning change's validity] without offending the takings clause." *Id.*[2] That is, the city "could not be said to have reached a final and authoritative determination of the development on [the company's parcel] until after the dispute about the legality of the [zoning change] had been resolved." *Id.* To sum up:

> In light of the foregoing, the difference between this case and *First English* [is] clear. Here, there was a postponement of development pending resolution of a threshold issue of the development process—whether the [zoning change] was [valid]—and not a final decision denying development. In *First English*, on the other hand, . . . there was no dispute about a threshold issue in the development approval process, as there was in this case, that would be a legitimate basis for postponing approval of development. The postponement of [Whitehead Oil's] development therefore does not constitute a temporary taking of property as that doctrine was conceived in *First English*.

Pet. App. at 32a.

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[2] The legitimacy of this litigation derives in part from the presumption of validity that attaches to all zoning ordinances in Nebraska (as no doubt in every other jurisdiction). *See, e.g., Whitehead Oil II*, 515 N.W.2d at 397 (holding that, "[i]n passing upon the validity of zoning ordinances, an appellate court should give great weight to the determination of local authorities").

But how instead did the Nebraska Supreme Court actually treat the company's takings claims? As opposed to a reading of *First English* that emphasized that decision's "narrowness" and its "implied limitation[s] on the temporary takings doctrine," *Landgate*, Pet. App. at 13a, the Nebraska Supeme Court took *First English* at face value: "a landowner may sue for damages when property is 'taken' by government regulation, even if the taking is only temporary *and the regulation later invalidated.*" *Whitehead Oil III*, 515 N.W.2d at 407 (emphasis added). Thus, the court did not engage in sophistic(ated) inquiry as to whether the city could "legitimately litigate" some "threshold issue of the development process." Rather, the court asked the straightforward question whether the city's denial of the use permit satisfied this Court's familiar two-pronged test for a categorical taking: "[L]and-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Id.* at 408 (alterations in original) (quoting *Nollan v. California Coastal Commission*, 483 U.S. 823, 834 (1987)).

Emphasizing an obvious point that seemed to escape the California Supreme Court—that the foregoing is "a disjunctive test under which a taking results if either element is not met," the Nebraska Supreme Court concluded that the city's action failed the first prong of the test. *Id.* That conclusion alone was sufficient to award damages to the company for a temporary taking; no further inquiry was necessary. *See id.* Moreover, these damages accrued ***not*** from the date of the "judicial determination of the validity of certain *preconditions to development*," *Landgate*, Pet. App. at 32a, but from "the date of the city's refusal to permit [the requested] use of the land" to "the date the city issues the permit Whitehead Oil seeks," *Whitehead Oil III*, 515 N.W.2d at 412. In Nebraska, therefore, a property owner ***can*** "recover damages for the time before it is finally determined that the [challenged government action] constitutes a 'taking' of his property." *First English*, 482 U.S. at 306-07. In so holding, *Whitehead Oil* cannot be reconciled with *Landgate*.

B. Idaho Supreme Court

Also in conflict with the decision below is the decision of the Idaho Supreme Court in *McCuskey v. Canyon County Commissioners*, 912 P.2d 100 (Idaho 1996) (*McCuskey II*). In that case, a property owner sought to construct a convenience store, a use authorized by the zoning in existence when he purchased the property. In 1986, the county initially granted a building permit, but quickly revoked it on the ground that the convenience store was inconsistent with a 1979 zoning ordinance that purported to downzone the property from "heavy industrial" to "rural residential." *See id.* at 101-02. The property owner challenged the county's action in a declaratory judgment action; more than six years later, the Idaho Supreme Court declared the 1979 ordinance void under state law. *McCuskey v. Canyon County*, 851 P.2d 953, 959 (Idaho 1993) (*McCuskey I*). The owner then sought "compensation for the County's interference with his use of the property, which he contends constituted a taking, during the period following the [revocation of the building permit] and until the date the opinion in *McCuskey I* was filed." *McCuskey II*, 912 P.2d at 103. That is, the property owner sought damages for a temporary taking pursuant to *First English*. The trial court denied relief on the ground that the takings claim was barred by the statute of limitations. *See id.* On appeal, the critical question was when did the takings claim first accrue.

Under *Landgate*, this would be an easy question: Because the judicial decision voiding the 1979 zoning ordinance was nothing more than "a judicial determination of the validity of certain *preconditions to development*" (namely, the precondition of compliance with 1979 zoning ordinance), the time spent obtaining that decision was "a normal part of the development process," and the six-year "postponement of [the owner's] development therefore does not constitute a temporary taking of property." *Landgate*, Pet. App. at 32a. Under this analysis, the takings claim could have accrued no earlier than the decision in

McCuskey I in 1993. The Idaho Supreme Court, however, gave an irreconcilably different answer:

> The time of taking occurs . . . as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent. In this case, [the property owner] was fully aware of the extent to which Canyon County interfered with his full use and enjoyment of the property in question on November 13, 1986, *the date that [he] was notified . . . that he could not build the convenience store.*

McCuskey II, 912 P.2d at 104 (citations omitted and emphasis added).

In *Landgate*, the "full extent of the plaintiff's loss of use and enjoyment of the property" became apparent no later than February of 1991, the date that the Coastal Commission denied Landgate's application to build a house on its property, in the process making clear that it would not approve any development. *See supra* pp. 3-4. Yet, in contrast to the Idaho Supreme Court in *McCuskey II*, the California Supreme Court in *Landgate* ruled that a taking did not occur—and, indeed, could not have occurred—at that time. This conflict, in conjunction with the conflict between the decision below and the decision of the Nebraska Supreme Court in *Whitehead Oil*, demonstrates that the present case warrants review under Rule 10(b).

CONCLUSION

Landgate's petition for certiorari should be granted.

In light of the close connections between the present case and *Lechuza Villas West v. California Coastal Commission* (No. 98-30), *see supra* pp. 1-2, the Court may also wish to consider consolidating the two cases or at least holding *Lechuza* pending the final disposition of the present case.

DATED: August, 1998.

Respectfully submitted,

ERIC GRANT
Counsel of Record
JAMES S. BURLING
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Facsimile: (916) 920-3444

Counsel for Amici Curiae

(5)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LANDGATE, INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

BRIEF OF *AMICI CURIAE* CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA BUILDING INDUSTRY ASSOCIATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CALIFORNIA FORESTRY ASSOCIATION, CALIFORNIA MINING ASSOCIATION, AND HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA IN SUPPORT OF LANDGATE, INC.'S PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

PAUL B. CAMPOS
HOME BUILDERS
ASSOCIATION OF
NORTHERN CALIFORNIA
P.O. Box 5160
200 Porter Drive
Suite 200
San Ramon, CA 94583
(925) 820-7626

RONALD A. ZUMBRUN
(Counsel of Record)
ZUMBRUN & FINDLEY
2150 River Plaza Drive
Suite 255
Sacramento, CA 95833
(916) 641-0015

Counsel for Amici Curiae.

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INTEREST OF *AMICI CURIAE*

The California Chamber of Commerce is a non-profit association with more than 10,000 members, both individual and corporate, representing virtually the entire spectrum of economic activity in California; the California Building Industry Association is a non-profit association with more than 5,000 members engaged in land development and commercial, industrial, and residential construction throughout California; the California Cattlemen's Association is a non-profit corporation representing California's beef cattle industry; the California Forestry Association is an association of California's forest product companies; the California Mining Association is an association representing over 50 companies involved in mining exploration, permitting, and production in California; the Home Builders Association of Northern California is a non-profit association representing over 950 members active in the home building industry in northern California.

Amici curiae represent a broad range of real property owners and a significant portion of California's regulated community. *Amici's* members are subject to land-use regulation by California's state and local governmental agencies on a daily basis and have historically sought to ensure that such regulation comports with the strictures of the United States Constitution's Just Compensation Clause. *Amici* and their members have long been active participants in California's regulatory takings arena and are able to bring to bear a unique perspective on why the Petition should be granted.[1]

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[1] Written consent has been obtained from counsel for Petitioners and Respondents for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the clerk's office. Pursuant to Supreme Court Rule 37.6, *amici curiae* affirm that

(continued...)

REASON FOR GRANTING THE PETITION

A STATE SUPREME COURT MAY NOT DISREGARD THIS COURT'S INTERPRETATION OF THE FEDERAL JUST COMPENSATION CLAUSE IN ORDER TO SHIELD STATE AND LOCAL GOVERNMENTS FROM PAYING COMPENSATION FOR A TEMPORARY TAKING.

For years the California Supreme Court and this Court have waged an ongoing battle over a fundamental question of regulatory takings law: where there is a judicial determination that a land-use regulation has denied all economically viable use of property and thereupon the governmental agency elects to rescind the regulation, is the property owner entitled to damages in inverse condemnation for the temporary taking of its property? The importance of the question cannot be overstated. As Justice Holmes recognized long ago, its resolution is determinative of whether the state's regulatory power will extend "more and more until at last private property disappears."

In a series of cases culminating with *Agins v. Tiburon*, 24 Cal.3d 266 (1979), *aff'd on other grounds*, *Agins v. Tiburon*, 447 U.S. 255 (1980), the California Supreme Court declared that the exclusive remedy for a land-use regulation that denies all economically viable use of property is invalidation—unless, after a judicial decree that the regulation goes "too far," the

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(...continued)
no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

governmental agency elects to continue the regulation and proceed to condemn the property in eminent domain. In short, the court took the position that there can never be damages in inverse condemnation for a temporary regulatory taking where the governmental agency rescinds the offending regulation. In the court's view, protection of the public treasury and expansion of the police power were sufficiently compelling public policy reasons to reject the availability of damages for a temporary taking.

While this Court could reasonably expect that its decisions to the contrary in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) settled the matter, the decision below indicates that the California Supreme Court has not accepted defeat. Relying *sub silencio* on *Agins v. Tiburon*, 24 Cal.3d 266 (1979) and its precursors, the California Supreme Court held below that the California Coastal Commission's denial of Petitioner Landgate's development permit did not effect a temporary regulatory taking requiring payment of compensation, notwithstanding that (1) the decision was ripe for review and (2) Landgate was denied all economically viable use of its property from the time of the denial until a court invalidated it.[2]

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[2] Petitioner correctly notes that in the Coastal Commission's Petition for Review to the California Supreme Court, the Commission did not seek review of the California court of appeal's determination that the Commission's permit denial deprived Landgate of all economically viable use of its property, and that under California Rules of Court, Rule 28, the issue was not before the California Supreme Court. *See* Pet. at 6 n.5; *see also Kavanau v. City of Santa Monica*, 16 Cal.4th 761, 779 (1997). The same is true of the court of appeal's determination that the Commission had made a final decision on Landgate's application.

This is an instance where what is past is prolog.[3] It is but the latest manifestation of the California Supreme Court's historical unyielding determination to shield California's state and local governmental agencies from *ever* having to pay damages to a property owner for a temporary regulatory taking. As the Petition ably demonstrates, the court's conclusion is fundamentally inconsistent with this Court's regulatory takings jurisprudence as well as decisions of other state and federal courts. *Amici* will not repeat these arguments. Rather, *amici* will place the decision below in its historical context, tracing its underpinnings back to the California Supreme Court's earlier regulatory takings cases.

Revisiting these cases reveals a remarkable similarity between them and the present case. In reasoning and result they are virtually indistinguishable. Indeed, it is not unfair to characterize the decision below as a purposeful attempt by the California Supreme Court to resuscitate these earlier opinions.[4] Thus, in addition to the persuasive reasons set forth in the Petition, this Court should grant review for an equally compelling one: to reaffirm that under the Supremacy Clause, a state supreme court is not free to disregard this Court's interpretation of the *federal* Just Compensation Clause based on the state court's determination that such an interpretation improperly threatens state and local treasuries. *Cf.*

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[3] Justice Brown, dissenting below, put it this way: "The more things change, the more they remain the same." Pet. App. 41a.

[4] It is no coincidence that the crucial initial decisions, like the decision below, were authored by Justice Stanley Mosk.

Reynoldsville Casket Co. v. Hyde, 115 S.Ct. 1745, 1747, 1749 (1995).[5]

A. A Constitutional Marker.

This Court set forth a constitutional marker on the question of the availability of damages in inverse condemnation in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In that seminal decision, the Court strongly suggested that a regulation which eliminates all beneficial use of property goes "too far" to be sustained as a proper exercise of the police power, triggering an obligation under the Just Compensation Clause to pay compensation. *Id.* at 415. Some 40 years later, the Court reaffirmed this principle in *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), confirming that "the form of regulation [can] be so onerous as to constitute a taking which constitutionally requires compensation." *Id.* at 594. While it may be that these decisions did not definitively answer the question, their import was sufficiently clear that Justice Brennan could opine that any decision precluding the availability of damages for a temporary taking would "flatly contradict[]" them. *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 647 (1981) (Brennan, J., dissenting).

B. Quiet On the West Coast Front.

Until the 1970's, the California Supreme Court gave no indication that it would resist the marker set forth in *Mahon* and *Goldblatt*. Indeed, in cases like *House v. LA. County Flood*

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[5] Below, even the dissenting Justices advanced the view that the California Supreme Court possesses discretion to reject United States Supreme Court precedent on a "point of constitutional law that is applicable to the very issue before us," so long as it provides a "reasoned basis" for doing so. Pet. App. 41a (Brown, J., dissenting).

Control Dist., 25 Cal.2d 384 (1944), the court acknowledged that "When [the police power] passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise *requires compensation.*" *Id.* at 388 (emphasis added); *see HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal.3d 508, 524 (1975) (Clark, J., dissenting). In 1973, however, the court decided the first of three cases portending that a battle with this Court would be joined over the issue of damages for a temporary taking.

C. Three Shots Across the Bow.

Between 1973 and 1975, the California Supreme Court decided three cases that together sent a clear signal that it would not abide by this Court's previous suggestion that a landowner is entitled to damages under the Just Compensation Clause where a regulation that substantially advances a legitimate state interest nonetheless denies all economically viable use of property. These cases are significant because they are the direct lineal antecedents of the present case.

The first, *Selby Realty Company v. City of San Buenaventura*, 10 Cal.3d 110 (1973), concerned a city's denial of a building permit to construct a 54-unit apartment complex on land already zoned multifamily. The landowner's complaint sought, *inter alia*, a writ of mandamus to compel issuance of a building permit and damages in inverse condemnation. The trial court granted the city's demurrer. *Id.* at 115-116.

The California Supreme Court, in an opinion by Justice Mosk, reversed the trial court as to the mandamus cause of action, but affirmed as to the inverse condemnation cause of action. The court held that although the landowner stated a

cause of action in mandamus to compel the issuance of a building permit on the ground that the city abused its discretion in denying the permit, there was "no[t] a cause of action in inverse condemnation stated for the denial of the building permit. The gravamen of plaintiff's complaint is that the city refused to issue the permit unless plaintiff complied with an assertedly invalid condition. *The appropriate method by which to consider such a claim is by a proceeding in mandamus*...." *Id.* at 128 (emphasis added). *Selby* is significant because it represents the genesis of the position advanced by the California Supreme Court in the instant case: that even where a plaintiff alleges that its property has been taken by regulation, mandamus rather than damages is the appropriate remedy.[6]

The second case was *State of California v. Superior Court of Orange County*, 12 Cal.3d 237 (1974).[7] In *Veta*, the landowner applied to the California Coastal Commission for a permit to develop property located in the coastal zone. The Commission denied the permit, and the landowner filed a petition in the superior court for a writ of mandamus and other relief, including damages in inverse condemnation in the amount of $8,815,250. *Id.* at 243, 252. The trial court overruled the Commission's demurrer and the Commission sought immediate review by prerogative writ. Overcoming its usual "great reluctance...to employ the prerogative writ to review rulings on

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[6] *Selby* would later gain notoriety in Justice Brennan's dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 655 n.10. In that dissent, Justice Brennan demonstrated how the regulatory excesses engendered by *Selby* vindicated Justice Holmes' admonition that, freed from any realistic possibility of financial liability for overzealous regulation, the "natural tendency" of state and local governments would be to extend the police power "more and more until at last private property disappears."

[7] The Veta Company was the real-party-in-interest.

the pleadings," the California Supreme Court granted extraordinary review because it "felt compelled to intervene in the early stages of the present case because of the prospect that the Commission's functions could be seriously hampered...if it were required to defend unmeritorious lawsuits *seeking damages* based on denials of permits. *Id.* at 243 n. 3 (emphasis added).

The California Supreme Court, again in an opinion by Justice Mosk, reversed the trial court and ordered it to grant the Commission's demurrer. It is significant that, for purposes of ruling on the demurrer, the court accepted as true the landowner's allegation that its "application for a permit was denied in order that its land would 'remain undeveloped and devoted to, and held for, public use as open space land.'" *Id.* 252-253. Nonetheless, the court rejected the landowner's argument that the permit denial "constitutes a taking or damaging of its land, *either permanently or temporarily*, without just compensation." *Id.* at 252 (emphasis added).

For purposes of the instant case, *Veta*'s importance stems from the court's clear suggestion that the *purpose* of a land-use regulatory measure is a *dispositive* factor in determining whether it effects a regulatory taking requiring compensation. Although Justice Mosk's opinion did allow that it was necessary to examine "the effect of the Commission's action upon Veta's property," *id.* at 235, the court gave *no consequence* to what that examination revealed—an alleged denial of all use or value. *See ibid*: "The situation involved in the present case is *virtually indistinguishable* from *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.*, 11 Cal.App.3d 557, 570-572 (1970). In that case the plaintiff alleged a taking of its property based upon the denial by the Bay Conservation and

Development Commission of a permit to fill a parcel of land in San Francisco Bay. *It was alleged that the land had no value except as fill.*" (emphases added).

Despite apparently accepting as true for purposes of the demurrer the allegation that the Commission's permit denial deprived Veta's land of all use and value, the court nonetheless concluded that Veta had not stated a cause of action for damages in inverse condemnation because of the *overriding public purposes* advanced by the Commission's permit denial. *Id.* at 253. Those overriding public purposes were the protection of the California coastline and the prevention of "haphazard" development. *Ibid*—the very public purposes identified by Justice Mosk in the opinion below as being so substantial as to immunize the Commission from damages even though its permit denial deprived Landgate of all economically viable use of its property for over two years. *See* Pet. App. 22a-25a.

The third case was *HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal.3d 508 (1975). Although only the "narrow issue" of whether a land-use regulation that causes a diminution in value of property—as opposed to a total deprivation of use—effects a regulatory taking was before the court, it nonetheless addressed the additional argument raised by "numerous *amici*" that the Just Compensation Clause mandates payment of damages where a regulation is found to have effected a taking. *Id.* at 511. The court answered the question in the negative. It opined that "neither the state and federal constitutions nor public policy compel or counsel" this result. *Ibid.*

In reaching its conclusion, the court relied on *Selby* for the proposition that "we have recognized mandamus as the proper remedy for allegedly arbitrary or discriminatory zoning, *id.* at

513, and *Selby* and *Veta* for the proposition that the impact of a land-use regulation on the value of the property cannot "constitute a taking impermissible in the absence of compensation." *Id.* at 514. According to the court, such a land-regulation "rises to a taking only in connection with inequitable precondemnation actions by the public agency." *Id.* at 516.

The court was unimpressed by the argument that invalidation of an overly restrictive regulation would not properly compensate a landowner that had in fact been deprived of all economically viable use during the period preceding judicial invalidation:

> Plaintiffs also...argue that even if they ultimately succeed in their efforts to obtain a court decision invalidating the challenged zoning ordinance, they will still suffer an uncompensated loss of use of the property in question during the period between enactment of the challenged ordinance and its demise.... [T]hey argue that invalidation of the offending zoning ordinance will not suffice to compensate them for the damage they suffered by reason of its existence.... The fallacy in the argument inheres in its failure to recognize that inverse condemnation lies only for a taking or damaging, while improper zoning may generally only be attacked by mandate....

Id. at 519-520.

Writing in dissent, Justice Clark took strong exception to the majority's conclusion. In his view, once a landowner establishes that a regulation has deprived property of substantially all beneficial use, the Just Compensation Clause

mandates compensation—at least for a temporary taking: "Once the landowner establishes his cause of action for damages, the condemning agency has several alternatives including...rescinding the downzoning, in which case the agency would be abandoning a condemnation, becoming liable to the landowner for interim damage, costs and attorney's fees." *Id.* at 527 (Clark, J. dissenting).

D. An Insurrection.

The court's decision in *HFH, Ltd.* ostensibly left "for another day...the question of entitlement to compensation in the event a zoning regulation forbade substantially all use of the land in question." *HFH, Ltd. v. Superior Court of Los Angeles County, supra*, at 518 n.16. The California court of appeal took the court's opinion at face value in *Eldridge v. City of Palo Alto*, 57 Cal.App.3d 613 (1976), *disapproved in Agins v. Tiburon*, 24 Cal.3d 266. In *Eldridge*, the landowners alleged that due to a municipal zoning ordinance "they were and are denied any substantial or reasonable use of their property," *id.* at 624. This confronted the court of appeal with the following questions: "May a zoning ordinance operate so oppressively upon affected property owners as to require payment of compensation in an action for inverse condemnation? Or, in such a case, is the landowner's sole remedy an action to invalidate the ordinance...?" *Id.* at 618.

Specifically noting the direction set forth in *Mahon* and reaffirmed in *Goldblatt*, and finding no "express holding of this state's Supreme Court," *id.* at 618, the court of appeal determined that "In light of the...authority on the subject we are unable to say, as a matter of law, that plaintiffs' complaints have not stated a cause of action for damages in inverse condemnation against the City." *Id.* at 629. Furthermore, contrary to the expressed view of the California Supreme Court,

the court of appeal concluded that there is "no merit" in the contention that because a regulatory action advances legitimate governmental purposes it is "in some way immune from the application of the rule of *Penna. Coal Co. v. Mahon*...." *Ibid.* Thus, the court of appeal recognized that a regulation that substantially advances legitimate state interests may nonetheless be challenged in proceedings for damages in inverse condemnation: "We opine...that a *valid* zoning ordinance may nevertheless operate so oppressively as to amount to a taking, thus giving an aggrieved landowner a right to damages in inverse condemnation." *Id.* at 621 (emphasis added).

Justice Sims dissented. In his view, *HFH, Ltd.*, *Veta*, and *Selby* foreclosed the possibility of a temporary taking even for a regulation that denied all economically viable use of property: "It is clear...that the confiscatory nature of the regulation is not grounds for a cause of action for damages, but the measure of the constitutional power to regulate.... [N]o compensation is in order unless the public body elects to proceed to condemn the [plaintiff's] interest[]. *Id.* at 640-641 (Sims, J., dissenting).[8]

E. Frontal Attack.

In *Agins v. Tiburon*, 24 Cal.3d 266 (1979), *aff'd on other grounds, Agins v. Tiburon*, 447 U.S. 255 (1980), the California Supreme Court "reach[ed] the issue" it had nominally left open in *HFH, Ltd. Agins v. Tiburon*, 24 Cal.3d 266, at 274. The court left no doubt that it would not follow *Mahon* and *Goldblatt* and that state and local agencies in California would

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[8] Justice Sims also found "The lone voice of Justice Brandeis," which argued against the regulatory takings concept in *Mahon*, to be "more attuned to modern concepts" of land-use planning. *Id.* at 640 n.5. This has clearly been the view held by a majority of the California Supreme Court at least since *Selby* and continuing to the present.

for all practical purposes never be liable for damages in inverse condemnation:

> [A] landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or administrative mandamus to invalidate the ordinance as excessive regulation.... He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid.

Id. at 273. In so holding, the court expressly disapproved *Eldridge v. City of Palo Alto, supra. Ibid.*

The court sought to portray its holding as consistent with *Mahon* and *Goldblatt*. It described those cases as having been "cited erroneously for the proposition that inverse condemnation is readily available as a remedy in zoning cases...." *Id.* at 274. This assertion, however, is not persuasive. It appears that the court simply disagreed with *Mahon* and *Goldblatt* and decided on public policy grounds to disregard them:

> We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged.... [T]he utilization of an inverse condemnation remedy would have a chilling effect upon the exercise of police regulatory powers at a local level because the expenditure of public funds would be, to some extent, within the power of the judiciary.... [T]he use of inverse condemnation with its imposition of money

> damages upon the public entity would, in our view, unwisely inhibit the proper and necessary exercise of a valid police power.

Id. at 276, 278.

The preceding passage from *Agins* is the key to every regulatory takings decision of the California Supreme Court from *Selby* through the present case. The doctrinal pronouncements common to each case—(1) that the public purposes advanced by a land-use regulation can be so important as to prevent it from effecting a taking even if it denies all economically viable use of property; and (2) that the exclusive remedy for a regulation that denies all economically viable use of property is invalidation unless the governmental agency elects to enforce the regulation permanently—were adopted and have been maintained to further the court's express goal that no California state or local agency be inhibited from exercising its police power to regulate the *use* of private property in whatever manner it deems necessary to effectuate sound land-use and environmental planning.[9]

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[9] Justice Clark saw this quite clearly:

> Today's real issue is the extent to which a court will permit—even encourage—governmental agency intrusion into a constitutionally protected area.... Today's decision effectively pronounces that henceforth in California title to real property will no longer be held in fee simple but rather in trust for whatever purposes and uses a governmental agency...elects, without compensation.

Id. at 283 (Clark, J., dissenting).

F. Aborted Counterattacks.

Almost immediately, this Court made clear that the California Supreme Court had erred grossly in *Agins* and its precursors. While for various reasons the Court was unable to repudiate *Agins* in a direct holding, see *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) (ripeness); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (ripeness); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981) (ripeness); and *Agins v. Tiburon*, 447 U.S. 255 (1980) (decided on other grounds), in *San Diego Gas & Electric Co.* a majority of the Court expressed agreement with Justice Brennan's forceful opinion that the Just Compensation Clause mandates compensation for a temporary taking:

> California courts have held that a city's exercise of its police power, however arbitrary or excessive, cannot as a matter of federal constitutional law constitute a 'taking' within the meaning of the Fifth Amendment. This holding flatly contradicts clear precedents of this Court.

Id. at 647 (Brennan, J., dissenting).

Recognizing that any interpretation of the Just Compensation Clause must square with its underlying purpose of ensuring fundamental fairness for property owners, Justice Brennan declared that "Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken." *Id.* at 655 (Brennan, J., dissenting) To the California Supreme Court's invocation of the need to protect the public fisc as justification for precluding such damages, Justice Brennan responded that "the applicability of express constitutional

guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches. Nor can the vindication of those rights depend on the expense in doing so." *Id.* at 661 (Brennan, J., dissented).[10]

G. Squelching Insurrection.

The California Supreme Court was unfazed by Justice Brennan's dissent or the fact that it represented the majority view of this Court. The same year that this Court decided *San Diego Gas & Electric Co.*, the California court of appeal issued a published opinion finding that a complaint alleging a denial of all economically use states a cause of action for damages in inverse condemnation, the court declaring that on the question of damages for a temporary taking, "California's position flatly contradicts clear precedent of United States Supreme Court cases." Two months later, the California Supreme Court ordered the opinion depublished.[11]

H. Two Missiles Launched. [12]

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court unambiguously and completely repudiated the principles

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[10] Justice Brennan also took issue with the assertion that invalidation rather than damages would necessarily promote sounder land-use policy. *Id.* at 661 n.26 (Brennan, J., dissenting).

[11] Prior to being depublished, *Gilliland v. City of Palmdale* was reported at 127 Cal.App.3d 386; 179 Cal.Rptr. 627 (1981).

[12] In *Lucas*, Justice Blackmun described the Court's opinion as a missile launched to kill a mouse. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1036 (Blackmun, J., dissenting)

which the California Supreme Court has consistently invoked to protect California's state and local governmental agencies from regulatory takings liability. *Lucas* held that a regulation which denies all economically viable use of property effects a categorical taking requiring compensation unless the governmental agency could have proscribed the proposed uses under background principles of state property law. *Id.* at 1027, 1031-1032. *Lucas* also held that such a regulation effects a taking requiring compensation even where the regulation—in *Lucas* a state coastal agency's permit denial—substantially advances important goals. *Id.* at 1020-1026. As the earlier discussion makes clear, *Lucas*' teaching on these points runs contrary to the California Supreme Court's insistence—continued in the present case—that a land-use regulation will not constitute a taking requiring compensation so long as it advances important environmental and planning interests even if it denies all economically viable use of property.

First English likewise rejected the second principle on which the California Supreme Court has historically invoked: that a land-use regulation can never give rise to damages for a temporary taking. Essentially adopting Justice Brennan's dissent in *San Diego Gas & Electric Co.*, the Court held that where a land-use regulation denies all economically viable use of property and thereby effects a taking, the landowner is constitutionally entitled to damages in inverse condemnation for a temporary taking even if the regulation is ultimately rescinded. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, supra,* at 319.

In a direct nod to Justice Brennan's earlier opinion, and a direct reproach to the California Supreme Court, the Court took dead aim at the key concern animating the California Supreme Court's regulatory takings jurisprudence, *i.e.*, its determination to ensure that California's regulatory agencies are able to

engage in expansive land-use and environmental planning with *no threat* of financial liability under the Just Compensation Clause. The Court firmly declared that although these concerns are not trivial, they cannot override the dictates of the Just Compensation Clause of the Fifth Amendment:

> We realize that...our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause is one of them.

Id. at 321.[13]

The history set forth herein, as well as the persuasive arguments put forth in the Petition, leaves no doubt that the California Supreme Court will not of its own volition follow this Court's precedents on this issue of federal constitutional law. The Petition should be granted to force it do so.

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[13] Chief Justice Rehnquist would echo this theme in *Dolan v. Tigard*, 512 U.S. 374 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First or Fourth Amendment, should be relegated to the status of a poor relation").

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RONALD A. ZUMBRUN
Counsel of Record

ZUMBRUN & FINDLEY
2150 River Plaza Drive
Suite 255
Sacramento, CA 95833
(916) 641-0015

PAUL B. CAMPOS
HOME BUILDERS
ASSOCIATION OF NORTHERN
CALIFORNIA
P.O. Box 5160
200 Porter Drive, Suite 200
San Ramon, CA 94583
(925) 820-7626

Counsel for Amici Curiae,
California Chamber of Commerce,
California Building Industry
Association, California
Cattlemen's Association,
California Forestry Association,
California Mining Association,
Home Builders Association of
Northern California

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No. 98-183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

LANDGATE, INC.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE CALIFORNIA SUPREME COURT

PETITIONER'S REPLY BRIEF

BENJAMIN M. REZNIK
(Counsel of Record)
JOHN M. BOWMAN
JEFFER, MANGELS, BUTLER
& MARMARO LLP
2121 Avenue of the Stars
Tenth Floor
Los Angeles, California 90067
(310) 203-8080
Counsel for Petitioner.

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I.
INTRODUCTION

In its opposition brief, Respondent California Coastal Commission (the "Commission") argues that Petitioner Landgate, Inc. ("Landgate") lacks standing to pursue a temporary takings claim in this Court despite the fact that the trial court awarded temporary takings damages to Landgate—a judgment that the California Supreme Court reversed without considering the alleged standing issue. Pursuant to Supreme Court Rule 15.6, Landgate respectfully submits the following reply brief to address this argument, which was raised for the first time before this Court in the Commission's opposition brief.[1/]

II.
LANDGATE HAS STANDING BECAUSE THE PROCEEDINGS BELOW RESULTED IN AN ADJUDICATION OF LEGAL RIGHTS WHICH CONSTITUTES THE KIND OF INJURY COGNIZABLE IN THIS COURT

The Commission argues that Landgate, as the "remainderman," lacks standing to pursue a temporary takings claim. Opposition, pp. 7-9. The Commission's entire argument is premised on the following assertions:

(1) That the Commission filed a motion in the trial court to dismiss Landgate's complaint on the alleged

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[1/]All of the other arguments contained in the Commission's opposition brief were thoroughly addressed in Landgate's Petition For A Writ of Certiorari and in the briefs filed by amici in support thereof. For this reason, a reply to the Commission's other arguments is unnecessary.

ground that Landgate did not have standing to pursue a temporary takings claim;

(2) That in response to this motion Landgate successfully moved to amend its complaint to include Peter and Punte Bogart (the "Bogarts") as plaintiffs; and

(3) That by amending its complaint to add the Bogarts as additional plaintiffs, Landgate somehow "prevented" the California courts from deciding the alleged standing issue. *See* Opposition, pp. 7-9.

The Commission's argument is specious and must be rejected for several reasons.

First, the Commission's opposition brief conveniently ignores the fact that the Bogarts, prior to joining the action as plaintiffs, assigned their interest in any future damage recovery to Landgate. 5 C.T. 1171. *See* California *Civil Code* § 954 ("A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner"). For this reason, the trial court deemed the Commission's standing argument to be moot. 5 C.T. 1227, 1167. These facts alone refute the Commission's contention that Landgate lacks standing.

Second, the Commission concedes, as it must, that the trial court judgment "jointly awarded damages" to the Bogarts *and* Landgate. Opposition, p. 8. This judgment was upheld by the California Court of Appeal, but was subsequently reversed by the California Supreme Court, which held that no regulatory taking had occurred. App. 35a. The California Supreme Court's decision, if allowed to stand, bars Landgate from ever recovering damages under the trial court's judgment. As such, Landgate is clearly

faced with an "actual or threatened injury" that is sufficiently "distinct and palpable" to support a finding that Landgate has standing in this Court. *Warth v. Seldin*, 422 U.S. 490, 498-501 (1975) (the standing requirement concerns the question of whether plaintiff has a sufficient "personal stake" in the outcome of a controversy).

Third, the Commission's self-serving statement that it "had no reason to pursue the standing issue" after the Bogarts were added to the complaint as additional plaintiffs (Opposition, p. 9) is a *non sequitur*, since there is no basis to conclude that the mere presence of the Bogarts as co-plaintiffs would have any effect on *Landgate's* standing. The addition of the Bogarts as co-plaintiffs did not preclude the Commission from pursuing the issue of *Landgate's* alleged lack of standing before the California courts. Thus, it is the Commission, not Landgate, that waited until now "to revive this issue." Opposition, p. 9. If the California courts were in any way "prevented . . . from resolving any factual issues regarding the Landgate-Bogart relationship," as the Commission asserts (Opposition, p. 9), it is the Commission, not Landgate, that is responsible.

Finally, Landgate is not required to satisfy federal standing requirements under this Court's decision in *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989). In *ASARCO*, various taxpayers and the Arizona Education Association sought a declaration in state court that a state statute governing mineral leases on state land was void because it violated federal legislative mandates. *Id.* at 610. The trial court upheld the statute, but the Arizona Supreme Court reversed, ruling that the statute was "unconstitutional and invalid" as to certain mineral leases. *Id.* Various mineral lessees filed a petition for certiorari, and this Court granted review. *Id.* Before addressing the constitutional

issues, this Court addressed several jurisdictional issues, including the following:

> The question is whether, under federal standards, the case was nonjusticiable at its outset because the original plaintiffs lacked standing to sue; and if so, whether we may examine justiciability at this stage because the Arizona courts heard the case and proceeded to judgment, a judgment which causes concrete injury to the parties who seek now for the first time to invoke the authority of the federal courts in the case.

Id. at 612.

After concluding that the plaintiffs would have lacked standing had they originally filed the action in federal court, this Court ruled that the petitioners had standing because "[t]he state proceedings ended in a declaratory judgment adverse to petitioners, an adjudication of legal rights which constitutes the kind of injury cognizable in this Court on review from the state courts." *Id.* at 618. As this Court explained:

> When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.

Id. at 623-24. This Court also observed that it would be "inappropriate" to dismiss the case at this stage because

"[t]hat disposition would come at the cost of much disrespect to state-court proceedings and judgments." *Id.* at 623.

Here, as in *ASARCO*, the state court proceedings "resulted in a final judgment altering tangible legal rights." *Id.* at 619. Since the court below held that no regulatory taking had occurred, the "final judgment" of the California courts clearly caused a "direct, specific, and concrete injury" to Landgate, the party seeking this Court's review. *Id.* Furthermore, because Landgate does not seek to secure an "abstract determination" or a "decision advising what the law would be on an uncertain or hypothetical state of facts," the requisites of a "case or controversy" are clearly met. *Id.* at 619, 623-24. For these reasons, Landgate has standing before this Court.

III.
CONCLUSION

For the foregoing reasons, and for all of the reasons set forth in Landgate's Petition For A Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

BENJAMIN M. REZNIK
Counsel of Record

JOHN M. BOWMAN
JEFFER, MANGELS, BUTLER
& MARMARO LLP
2121 Avenue of the Stars
Tenth Floor
Los Angeles, California 90067
(310) 203-8080
Counsel for Petitioner

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